86 - 1126

No.

Supreme Court, U.S.
FILED
DEC 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED CHURCH OF THE MEDICAL CENTER, an Illinois religious corporation, **THE UNITED METHODIST BISHOP OF THE CHICAGO AREA**, et al.,

Petitioners,

v.

STATE OF ILLINOIS MEDICAL CENTER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

SAMUEL W. WITWER, JR.*
SAMUEL W. WITWER, SR.
WITWER, MORAN, BURLAGE & WITWER
125 South Wacker Drive, Suite 2700
Chicago, Illinois 60606
(312) 332-6000
Attorneys for Petitioners

WALTER P. MAKSYM
Of Counsel

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether the Respondent state Commission, in authorizing the partial condemnation of church property, violated the Fourteenth Amendment's proscription against taking of property without due proces of law when three of the four Commissioners who were present and voted upon the enabling resolution were subsequently discovered to have been affiliated with the private institution (a hospital) which, by secret pre-arrangement, was to be the intended recipient of the condemned parcel; particularly so, when one of the Commissioners, who moved passage of the resolution in furtherance of the covert plan, was the hospital's own attorney?

2. Whether in a partial condemnation of real estate the property owner can obtain just compensation as guaranteed by the Fifth and Fourteenth Amendments, if, as here, he is prevented from ascertaining and proving severance damages to his remainder, because the condemning authority will not disclose what use it intends to make of the adjoining portion of the property actually condemned?

3. Whether a state agency exceeds its authority to condemn private property only for "public" purposes under the Fifth and Fourteenth Amendments and violates the property owner's corresponding right to contest the existence of a valid public purpose when said agency never considered a proposed future use for the tract, lacked any plan or concept in regard thereto, and for six (6) years has refused in its pleadings, discovery responses and testimony, to inform the Church or the state court what it proposes to do with the condemned property?

PARTIES TO THE PROCEEDING

The other parties to this case not included in the caption (i.e. other than United Church of the Medical Center and the resident United Methodist Bishop of the Chicago area) are the Board of Home Missions and Church Extension of the Methodist Church (formerly the Methodist Episcopal Church), the Northern Illinois Annual Conference of the United Methodist Church and the Board of Home Missions and Church Extension of said Annual Conference.

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v.

STATE OF ILLINOIS MEDICAL CENTER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

United Church of the Medical Center and the Resident United Methodist Bishop, Chicago Area, et al., respectfully petition for a Writ of Certiorari to review the judgment of the Appellate Court of Illinois, First District, in this cause, review of which was denied by the Supreme Court of Illinois upholding a partial condemnation by Respondent of Petitioner Church's religious property.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District (App. A, *infra*), is reported at 142 Ill. App. 3d 498 and at 491 N.E. 2d 1237 (1st Dist. 1986). The Orders of

the Supreme Court of Illinois denying Petitioners leave to appeal (App. B, *infra*) and denying Petitioners' Motions for leave to file a Motion for Reconsideration (App. C, *infra*), are not reported.

JURISDICTION

The Supreme Court of Illinois declined to grant Petitioners leave to appeal on October 2, 1986. There is no provision in Illinois practice for the filing of a Petition for Rehearing of such a decision by the Supreme Court of Illinois to deny leave to appeal. Petitioners did, however, file a motion with the Supreme Court of Illinois for leave to file a Motion for Reconsideration, which motion was denied on December 1, 1986.

The petition is being filed within 90 days of the Supreme Court of Illinois' order refusing leave to appeal, filed October 2, 1986. This Court has jurisdiction to review the Illinois Appellate Court's judgment by Writ of Certiorari pursuant to 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation of the following provisions:

1. The Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

2. The Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, which provides in pertinent part:

> ". . . nor shall private property be taken for public use, without just compensation. . . ."

STATEMENT OF THE CASE

To Petitioners' knowledge, no reported decision has ever before involved the contested taking by a governmental body of real property owned and actively used by a religious congregation.[1] All of the religious units sued by the State's Medical Center Commission ("Commission") as parties defendant interested in the real estate, are constituent organizations or officials of the United Methodist Church. These include the office of the Church's Resident Bishop of the Chicago Area.

While no claim is made here by Petitioners that churches are constitutionally immune from condemnation under proper circumstances, state procedures which offend a property owner's constitutional rights to due process and just compensation warrant special concern where, as here, a church is the target. The facts are these:

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[1] See, Comment, *University of Colorado Law Review*, Vol. 46, p. 43 (1974) which notes:

> "Because legislative and administrative bodies have sensitively respected the interests of churches, there is a paucity of cases involving church condemnation and an absence of condemnation theory concerning churches."

A. The Background of the Taking.

The parcel sought to be condemned in this partial taking (sometimes referred to as "Lots 1, 2 and 3"), is a fenced parking lot approximately 75 feet by 150 feet in size adjoining the Church sanctuary in Chicago. The Methodists have operated a church and programs supporting the healing arts on this site continuously since 1893. The parcel affords the Church about one-half of its available offstreet parking.

Since 1967, the targeted property (Lots 1 through 3) and the remainder (Lots 4-10) purchased with funds from Methodist sources, have undergone unified use for the religious purposes stated through a joint Methodist-Presbyterian ecumenical program (Testimony, Vol. III, Tr. 78-79; Vol. VII, Tr. 11).

The United Methodist denomination's investment at this site, in terms of both service and dollars, is substantial. In recent years, the United Methodist Conference in Northern Illinois has subsidized the Church's medical center programs by grants aggregating nearly $900,000 (Vol. III. at Tr. 69).

B. The Decisions Below.

During the trial phase, the Church filed an original and four amended traverses to the condemnation petition. It sought to dismiss the action for lack of any disclosed public purpose, administrative conflict of interest and a variety of other defects. The trial court denied all such motions. At the compensation trial, it also refused to permit the Church to proceed to introduce evidence on severance damages to its remainder property, reasoning that there was insufficient unity of title between the two adjoining parcels. It awarded the Church $45,000 for the parking lot alone.

The Appellate Court affirmed in all respects, save only its reversal of the Trial Court's refusal to take evidence on the question of damages to the Church's remainder. It remanded the case for that limited purpose. However, the Appellate Court did not grant the Church's request that the Commission give it information concerning its intended use of the condemned portion of the property adjoining its sanctuary. This left the Church unable, on remand, to ascertain or prove the actual severance injury to its sanctuary except by pure speculation.

Under the Medical Center Commission's enabling statute, the Illinois Medical Center Commission Act, churches and other "religious organizations" have long been contemplated as being among the several classes of institutions occupying and working within the district. See references to "religious organizations" at Ill. Rev. Stat., Chapter 111½, Section 5004. In a January, 1947 letter from the Church to the Commission, it was stated:

> "We are very happy to learn . . . that the Church is recognized by the Commission as a service agency which the Commission desires to have remain in the Medical District." (Def. Ex. 16).

However, about 1973, there began a series of events designed to push the Church from its site for the benefit of a nearby private hospital. Rush-Presbyterian St. Luke's Medical Center (hereinafter called "Rush"), an occupant of the district, having embarked upon an aggressive program to acquire land, made several overtures to purchase the entire property at a nominal price far less than the Church's investment in the site.[2] (Def. Ex. 15). Money was not, however, the issue.

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[2] The Church fathers asked to be given a reason or explanation of proposed use to explain Rush's interest in the land. Such a reason, although frequently requested, was not given and has yet to be given to this day as more fully developed below.

The Church's official board rejected the offers, based on their desire to continue the Church's work in the district at its historic location. Unknown to the Church and not discovered by it until years later, Rush then covertly turned to the Medical Center Commission for assistance. (Def. Ex. 15). The Commission, in turn, secretly pledged to secure the Church's property for Rush by one means or another.

Evidence uncovered through discovery shows that the Commission staff lent its support to Rush's goal of forcing the Church to sell the property by making it highly uncomfortable for the Church to remain in the District. This course of conduct would not be particularly unusual or significant, in and of itself, were it not for the hidden interlocking relationships and conflict of interest between the Commission and Rush, as shown later.

First, by letters dated December 3, 1976 and January 11, 1977, the Commission's Executive Director, Raymond J. Bayster, sought to induce the City of Chicago's Zoning Administration to investigate and bring sanctions against the Church for allegedly "illegal" parking by members of the public (actually employees of Rush Hospital) in the Church's lot. (Def. Exs. 12 and 13). These efforts to embroil the Church in difficulty with the Zoning Administration were unproductive. (Testimony, Vol. III at Tr. 98).

The next move by the Commission took the form of a series of legally ineffectual resolutions to condemn the parking lot dated June 16, 1978, September 15, 1978, December 14, 1979 and July 17, 1981, respectively.[3] (Pet.

[3] The definitive resolution supporting the taking was the resolution of July 17, 1981, prepared by new legal counsel to the Commission to cure or "tighten up" defects in the earlier three resolutions.

(Footnote continued on following page)

Exs, 1, 2 and 3). Rush's behind the scenes involvement was not open and visible but clandestine. Incredibly, it has been hotly denied to this day even though it is irrefutable. The Commission's Executive Director testified that he had no recollection of any effort by Rush to institute the taking. (Vol. II at Tr. 30-31). However, Commission records surrounding these resolutions, which came to light in discovery, disclosed otherwise. Several contain the notation "request of RPSL [Rush Hospital]." (See, e.g., Def. Ex. 2 at item 5(c) attached hereto as Appendix F.)

At the hearing, the Commission's Director explained that these written references to Rush were merely a "mistake." (Vol. II at Tr. 31). However, comments by the Commission's Chairman, in the minutes of the meeting of June 16, 1978 ("This is the request of Rush-Presbyterian") leave little doubt that the Commission well understood the source of the item of business before it. (Def. Ex. 1 at p. 45). In fact, one of Rush's attorneys, present as an observer at the meeting, reacted with consternation at the Chairman's having referred to Rush openly on the record, saying it gave him a "coronary." (*Id.*)

Finally, 1979 correspondence obtained in discovery by the Church between Rush's attorneys and the Commission (See attached Appendices G, H and I) leaves no doubt that the property was really being taken for Rush's benefit:

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[3] *continued*
(Def. Ex. 4 at pp. 16-17). For example, the first two resolutions contained no legal description at all. The third contained an incorrect legal description including a portion of the Church's sanctuary on Lot 4. (Pet. Ex. 2). None of the three resolutions attempted to describe any purpose for the taking. The conflicts of interest surrounding the passage of the fourth definitive resolution are separately addressed below.

> "Dear Ray: [Commission's Executive Director] . . . In instituting a condemnation action, please do not forget that the portions of the vacated alley to the west of the [church] parcels in question are to be included in the action. . . ." (App. Ex. H attached).

The predicate for the partial condemnation action on Lots 1-3 appears to have been Section 5004 of the Illinois Medical Center Commission Act, Ill. Rev. Stat., Ch. 111½, Sec. 5004, which forbids the Commission to condemn property of a "religious organization used by it for religious purposes," but authorizes the Commission to proceed against property "used for both religious and secular purposes." Apparently, the Commission viewed the "religious use" exemption as a bar to condemnation of the sanctuary building but no obstacle to its separate condemnation of the parking lot serving that edifice.

C. The Attempted Reverter Action.

The sanctuary did not escape the Commission's attentions, however, for its undisclosed objective was to aid Rush in taking over the entire Church site. Thus, in April, 1980, the Commission added to the condemnation action new title reverter charges and a notice of hearing aimed at taking away, without compensation, the remainder of the Church's properties (Lots 5 through 10).[4] (Def. Ex. 15). This action was predicated on the professed "discovery" that the Church had purportedly violated conditions contained in a deed from the Commission to its legal predecessor twenty-one years earlier. The Commission then appointed Mr. Bayster, its Executive Director since

[4] For some reason Lot 4, situated in the middle of the Church complex, escaped attack under both the condemnation case, as amended, and the reverter charges.

the early 1960's and before that, its lawyer, as the hearing officer in the reverter matter to hear these new charges of non-use or disuse which Bayster *himself* had arranged to be brought against the Church (*Id.*).

The reverter action against Lots 5 through 10 thus complemented the concurrent condemnation action against Lots 1 through 3, making possible the seizure of nearly all the Church's lands and improvements by one device or the other. While Bayster vehemently denied at the hearing that any interrelationship existed between the attempted condemnation of Lots 1-3 and the attempted reverter of Lots 5-10 (Vol. I, Tr. 6-7), he is quoted in the Commission meeting minutes of June 20, 1980 as confirming such a linkage by describing the related proceedings against the Church properties as a "dual action." (Minutes of June 20, 1980 at pp. 38-39; Def. Ex. 14).

As noted earlier, Rush and its counsel worked closely behind-the-scenes with Bayster in preparing and intensifying the legal pressures against the Church, actions which might not be particularly remarkable except for the special linkage which existed between Rush and the Commission, as will hereinafter be described. On November 5, 1979, one of Rush's attorneys wrote Bayster, furnishing him with a "necessary parties" search. (App. H, attached). On March 17, 1980, that attorney again wrote to Bayster to advise him of the investigation he had made into the corporate history of the Church's Wesley Foundation, apparently, to assist Bayster in the "reverter" leg of the "dual action." (App. I, attached).

At or around this time, Rush also commenced and financed a secret day-and-night surveillance of the Church's facility, exhaustively recording all parking activity over several days and listing vehicles by make and license number (Def. Ex. 10). This "stake-out" was presumably carried out to determine the level of parking lot usage by

religious officials and worshipers so as to build a case of "non-use" or "partly secular use" against the Church.

Under severe pressures from the Commission's reverter procedure, the Church turned to the federal courts for relief in a Section 1983 action, complaining that the Commission was trying its own reverter case in violation of due process principles. This Section 1983 action was ultimately successful in stopping the reverter, as more fully described below, (See *United Church of the Medical Center v. Medical Center Commission*, 689 F. 2d 693 (7th Cir. 1982)); however, it did not deal with the Commission's separate condemnation case which continued unimpeded.

D. The Commission's Filings in State Circuit Court.

When the Commission filed its Petition for Condemnation in the trial court, it broadly described the statutory purpose of the Medical Center District and made a recital of "necessity" but provided no intimation or disclosure as to what was to be done with the subject property. The only clue as to a possible reason for the taking was the phrase "request of RPSL" discovered in Commission records, but as mentioned above, the Commission's Executive Director denied under oath that the condemnations were instigated by, or for the benefit of, Rush. (Vol. III at Tr. 10). This vagueness as to "purpose" would be puzzling, were it not for the fact that the Commission did not wish to disclose its underlying pre-arrangement with Rush and that the taking really had no purpose, plan or specifically identifiable medical objective other than a punitive effort to coerce the Church into submission after it had displeased Rush by turning down its purchase overtures.

In July, 1981, after the condemnation case had been pending for approximately thirteen months, a new at-

torney was substituted as special counsel for the Commission. At or about that time, the Commission adopted a purportedly retroactive amendment designed to "tighten up" earlier resolutions, wherein for the first time it belatedly professed to recite a "purpose," namely, "medical institutional expansion." (Pet. Ex. 4).

Neither the transcript of the July 17, 1981 meeting in which the "curative" action took place nor the transcripts of the earlier meetings of 1978 and 1979 include any discussion of a need for "medical institutional expansion" across the Church's land. In fact, the record is devoid of any information as to what institution, if any, is to expand, what form that expansion would take, and how any expansion would relate either to the parking lot or the entire 10 lots making up the Church's property. For example, Bayster testified as follows:

> "Q. (By Mr. Witwer, Jr.): Now, in terms of the words used . . . [medical institutional expansion], I'm simply asking whether there was, at that time, a deliberation over the need for expansion onto the Church's land?
>
> "A. (Bayster): The answer is no." (Vol. I at Tr. 42).

To the contrary, the only possible applicable reference to expansion preceding the vote on the "tightened up" resolution is the following comment by Commission Brown at the June 16, 1978 meeting:

> ". . . I think Rush-Presbyterian St. Luke's is having a little problem with expansion. The federal government and the state both are intervening and saying that they are over-expanded now, they have too many beds." (Minutes of June 16, 1978, excerpt attached to Def. Mem. in Support of Second Amended Traverse at Ex. A-1).

E. The Ties Between Certain Commissioners And Rush.

This is not a "rule of necessity" case since the Commission has seven (7) members, four (4) of whom have no discernible ties to Rush. However, discovery disclosed that three of the sitting commissioners who actually authorized the condemnation at a meeting attended by a bare quorum of four, have important links to Rush. The Appellate Court failed to mention these facts in its opinion. Commissioners Livingston and Hoffman are top officers of the Chicago Foundling Home which, by the Commission's own description, is an "affiliate" of Rush operating within the Medical Center District.[5] Livingston receives in excess of $5,000 per annum in that capacity. (Vol. I at Tr. 73-74). *Commissioner Roach was, until sometime in 1979, an officer of Rush acting as its principal in-house legal counsel. (Def. Ex. 11 at par. 2). Immediately thereafter, he became and he remains a partner of Gardner, Carton & Douglas, a Chicago law firm, and is Rush's principal outside counsel.* (Vol. III at Tr. 51).

The minutes of the Commission reflect that Messrs. Livingston and Hoffman did not recuse themselves from the condemnation vote against the Church in the meetings of June 16, 1978 and September 15, 1978, respectively.

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[5] At the trial, the Commission's counsel contended that the relationship was not one of affiliation "as such," (Vol. I at Tr. 73) and Bayster insisted that ". . . there is no affiliation between Chicago Foundling Home and the Rush-Presbyterian St. Luke's." (Vol. III of Tr. 33). However, this is contrary to an earlier discovery response signed by Bayster which stated:

> "None of the people [Commissioners) named above had or have any affiliation with Rush . . . except . . . Roach . . . who, until recently, was general counsel for RPSL; and . . . Livingston, who is President of the Board of the Chicago Foundling Home with whom RPSL contracts for services; and . . . Hoffman, who is Chairman of the Board of Chicago Foundling Home." (Def. Ex. 11 at par. 2).

Similarly, the minutes of December 14, 1979 (Def. Ex. 3) and the key July 17, 1981 meeting (Def. Ex. 4) which enacted the "curative" condemnation resolution against the Church, show continued participation by Commissioners Livingston and Hoffman. The July 17th minutes likewise record no recusal of Commissioner Roach, the hospital's own attorney on the condemnation issue. In fact, it was Roach who moved adoption of the definitive resolution of condemnation of July 17, 1981. (Pet. Ex. 3; Def. Ex. 4 at p. 18).

It is noteworthy that Roach elected to recuse himself from the Commission's companion reverter proceeding, but only after the Church sought federal relief against the reverter case in a Section 1983 proceeding and the matter was pending on review in the federal appeals court. We respectfully ask this Court to take judicial notice of Mr. Roach's recusal letter of January 14, 1982 which was submitted by Rush's counsel to the Seventh Circuit Court of Appeals in Cause No. 81-2887 (Appendix J attached); *also*, Rush's brief to the Seventh Circuit Court of Appeals in that cause, page 36, footnote 21, where Rush acknowledged that:

> "Commissioner William Roach arguably has *a direct personal interest* in the outcome of the reverter proceeding due to his law firm's representation of RPSL and RPSL's interest in the subject property. However, Commissioner Roach has recused himself from the [reverter] matter and will take no part whatsoever in any deliberations or discussions with respect thereto." (emphasis added).

The recusal came too late to help the Church in the separate condemnation case here at issue, where Roach's participation was already an accomplished fact and indeed, was indispensable as part of the quorum of four needed to conduct Commission business at that particular meeting.

Due process objections concerning these disqualifying conflicts of interest were raised by the Church early in the trial court proceeding (Second Amended Traverse and Motion to Dismiss filed April 15, 1981 [c-71, c-76] and were renewed throughout the trial phase (Reply in Support of Second Amended Traverse filed December 8, 1981 at pp. 4-10 [c-134, c-182] and in the state appellate proceeding (Brief for Appellant at pp. 37-39).

F. The Church Gets Relief From The Seventh Circuit in the Reverter Case.

On September 2, 1982, the United States Court of Appeals for the Seventh Circuit, in the Section 1983 case brought by the Church, ruled that the Commission's administrative reverter proceeding, held before itself, was void and unconstitutional because of the Commission's inherent bias and self-interest. *United Church of the Medical Center v. Medical Center Commission and Rush-Presbyterian St. Luke's Medical Center*, 689 F. 2d 693 (7th Cir., 1982).

Notwithstanding this development with respect to the "remainder" portion of the Church's property, effectively reducing the size of the Commission's available "target" by 70% (from ten lots down to three 25-foot lots), the Commission nevertheless, without further deliberation or determination as to the necessity of seizing the 75-foot piece of the Church's land, persisted in its efforts to condemn the small parking lot, standing alone:

> "By Mr. Witwer, Jr.:
>
> Q. Well, Mr. Bayster, has there been any discussion by the Commission as to whether it would still [after the 7th Circuit's injunction] be appropriate or necessary to go for the three lots here at issue?
>
> A. *There hasn't been any discussion at all.*

Q. Has there been any discussion by the Commission as to whether it would be feasible to put any kind of a structure on three lots of 25-foot width, which are now the parking lot?

A. I have answered that before. *There is no use for that property as yet.* They have the purpose, but not the use." (Vol. III at Tr. 7). (emphasis added).

G. The Church's Futile Efforts to Ascertain Its Injury Resulting From The Partial Taking, and Thus, Its Inability to Determine the Magnitude of Its "Just Compensation" Claim.

As noted above, from the inception of this case the Church experienced total frustration in its attempts to seek information as to the "purpose" or "plan" underlying the taking, not only to determine whether a public purpose is involved and the necessity for the action, but also, to assess the nature of the injury to the remainder likely to arise from any possible but yet unarticulated project. This, of course, is crucial to the proof and recovery of just compensation.

On May 11, 1982, the Church filed its Fourth Amended Traverse in the trial court, reiterating its constitutional protest over the lack of hard information in the pleadings or resolutions surrounding the existence of any purpose for the taking. (C-231). On June 7, 1982, the Church sought such a bill of particulars by way of a discovery deposition of Bayster. The results of this effort are summed up in the following deposition testimony by Bayster:

"Q. Beyond that [a general medical purpose], do you have any purpose in mind for the use of the property?

A. We don't have any—we don't work that way. We get the property first." (Dep. of June 7, 1982 at Tr. 16).

* * * *

"Q. To this day have you been made aware, either through verbal conversation or through written materials, of a plan or purpose for Lots 1 through 3?

A. No." (*Id.* at Tr. 18).

The traverse hearing testimony of Bayster shortly thereafter added nothing concerning the reasons for this condemnation, either at its inception—when it was part of a 10-lot acquisition program—or, following the action of the United States Circuit Court of Appeals, Seventh Circuit, standing alone as a 3-lot taking:

"Q. (By Mr. Witwer, Jr.): Mr. Bayster . . . is it your testimony then that you don't know what the use will be there at the corner of Ashland and Harrison after this taking is completed?

A. There will be a—there will be some medical conforming use.

Q. But you don't know what it is?

A. Not at this time.

Q. And you don't know who the user will be?

A. No, I don't." (Vol. I at Tr. 56-57).

Finally, at the compensation phase of the trial, the Church's counsel renewed his objection that the Commission's refusal to disclose "purpose" would deprive the Church of its ability or any fair opportunity to ascertain and prove-up its rightful compensation in the form of severance damages to the remainder. (Appendix E attached). These constitutional arguments were raised once again in the Appellate Court of Illinois (Brief of Appellant at pp. 33, 36; Reply Brief of Appellant at p. 8).

Six years after it commenced this condemnation, the Commission *still* refuses to determine or announce what use is to be given to the property it insists on taking away from the Church. At any time during this six-year period, the Commission could easily have defined and dis-

closed its purpose to the Church, but it chose not to do so, notwithstanding repeated pleas for clarification of its intentions. It even cancelled and never reinstated a June 18, 1982 meeting which had been called to determine the property's "ultimate use". (Appendix L attached).

REASONS FOR GRANTING THE WRIT

A.

THE CONDEMNATION PROCEEDINGS WERE FATALLY INFECTED WITH ADMINISTRATIVE BIAS AND CONFLICT OF INTEREST AND SHOULD THEREFORE HAVE BEEN INVALIDATED.

It is elementary that the administrative process must provide both fairness and the appearance of fairness where, as here, a governmental agency or commission is empowered to make determinations which directly affect fundamental rights of individuals. Due process demands a disinterested decisionmaker to assure fairness. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F. 2d 260 (D.C. Cir. 1962).

Here it must be recalled that the key resolution supporting the taking, dated July 17, 1981, was passed by a vote of four commissioners (bare quorum) three of whom had close "conflict of interest" ties to Rush, the undisclosed instigator of the action which would not be deterred in its quest to take over the Church's lands. The resolution's movant, Commission Roach, was at the time, a key attorney for Rush. A more pervasive conflict of interest by public officials is difficult to imagine. Here due process was blatantly scoffed at since the very persons who were empowered to make and did make the determination to

condemn the Church's property had a passionate, partisan and economic interest in the result.

This Honorable Court and other inferior courts, including the Illinois Supreme Court, have long condemned the undermining effect which conflict of interest and related bias bring to bear upon the administrative process. *Gibson v. Berryhill*, 411 U.S. 564, 36 L. Ed. 2d 488 (1973) (administrative deprivation of professional license by self-interested administrative tribunal); *Trans-World Airlines, Inc. v. Civil Aeronautics Board*, 254 F. 2d 90 (D.C. Cir. 1958) (former attorney for litigant later became CAB commissioner participating in case); and *American Cyanamid Company v. F.T.C.*, 363 F. 2d 757 (6th Cir. 1966) (former attorney for Senate Committee investigating drug companies later became chairman of F.T.C. and participated in decision adverse to such companies).

Nor can it be simplistically argued, as did the Commission below, that a condemnation resolution such as the instant one is a purely legislative act, *ergo*, procedural due process requirements are inapplicable or greatly diminished. Here, a state commission permeated with disqualifying conflicts of interest passed a resolution which *directly took property from another to give it to a recipient to which it owed an undisclosed economic allegiance.* The Church's only recourse was to defend in a state court system which traditionally grants virtually automatic deference to such administrative decisions.

The degree of "due process" required to be accorded in a given instance depends on the circumstances (*Goldberg, supra*, at 397 U.S. at 262-263). Whatever relaxation, if any, of procedural due process guaranties may be appropriate in regard to legislative action of broad and general applicability (*Cf, Pillsbury Co. v. F.T.C.*, 354 F. 2d 952 (5th Cir. 1966)) most certainly it is *not* appropriate where an administrative action is beamed narrowly and

directly at the property interests of a single owner. This distinction is recognized in the following distinguished commentary:

> "When an administrative agency engages in a legislative function, as, for example . . . regulations of *general* application affecting an unknown number of persons . . . [procedural due process, such as a hearing need not be afforded]. *On the other hand,* if a regulation, sometimes denominated an "order" . . . affects the property or interest of *specific named individuals* . . . the question [of] notice and hearing . . . becomes a matter of greater urgency. . . ." (emphasis added). "*The Constitution of the United States, an Analysis and Interpretation*", Congressional Research Service (1973 ed.) at p. 1432.

Clearly, the federal Constitution demands every bit as much procedural due process protection in the instant administrative proceeding (whether or not denominated as "legislative") as it would in the most intrusive judicial or quasi-judicial action directly threatening landowner's property interests. The decision below must be promptly reversed.

B.

THE APPELLATE COURT SHOULD HAVE INVALIDATED THE PARTIAL TAKING, SINCE THE RECORD ESTABLISHED THE COMMISSION ACTED ARBITRARILY AND SOLELY TO COERCE THE CHURCH INTO DEALING WITH RUSH ON RUSH'S TERMS. IN THE ABSENCE OF ANY LEGITIMATE, ANNOUNCED PURPOSE TIED TO ACTUAL FUTURE USE AND NECESSITY, THE COMMISSION LACKED AUTHORITY TO CONDEMN.

1. Reasons Why Showing Of "Purpose" And "Necessity" Are Required In Any Condemnation Case.

Except in the specialized areas of urban renewal and blight removal, not applicable here, a public agency has

no right to simply "condemn-now-and-decide-later" how a particular parcel of land is to be used. This principle applies with even greater force where a partial taking is involved since damages to the remainder must be ascertained in order to fulfill the constitutional requirement of safeguarding the Church's right to "just compensation." Here, the absence of a prior real purpose for the instant condemnation (except to pressure the Church into submitting to Rush) deprives the Church of its fundamental right under the Fifth and Fourteenth Amendments to have its property taken only for a "public purpose". The belated Commission resolution amendment adding the words "medical institutional expansion", subsequent to a change of the Commission's legal counsel months after the suit was commenced, did not cure the deficiency. As the testimony clearly shows, such a bare gesture of paraphrasing statutory purposes was meaningless since it did not reflect any real deliberation as to an actual objective or need for the taking.

The Illinois Eminent Domain Act provisions now found at Chapter 110, Ill. Rev. Stat., Section 7-101 *et seq.*, which are expressly incorporated by reference in the Medical Center Commission's enabling statute, require, *inter alia*, that there be a specification of a ". . . purpose for which the property is sought to be taken or damaged. . . ." Righeimer, the leading authority on Illinois condemnation, interprets the plain meaning of this provision as requiring description of ". . . a park, highway, school site, etc." Righeimer, "Eminent Domain in Illinois", (1972) at Sec. 3.04, p. 25 footnote 5. There is no suggestion in Righeimer's text that vague or general references to "public" or "medical" purposes will suffice.

While deference is ordinarily given to the action of a condemning authority, this and other courts have always claimed the ultimate prerogative of determining whether

the taking is for a "public use" and whether the taking is "necessary" for that use. *City of Cincinnati v. Vester*, 281 U.S. 439, 444 (1930).

If the landowner is to have a meaningful right to challenge the condemning authority's action on the constitutional ground that it has no proper public purpose, it necessarily follows that an alleged projected use must be fixed and declared by the condemning body before, not after, the court proceedings take place. Any infringement of this right has particularly grave implications in proceedings to secure a "partial taking" as is the situation in the matter at bar. If, as here, the condemnee is left uninformed and is given mere meaningless generalities reciting broad statutory purposes, his right to defend against improper taking is an empty one indeed. If he doesn't know what the real purpose is, he can hardly challenge it as a "non-public" exercise. But worse, still, when a partial taking is involved, this right assumes an even greater constitutional dimension impacting the condemnee's ability to assess and prove the extent of any injury to the remainder so as to insure recovery of just compensation for damage to that property.

The Commission's vagueness as to the purpose of the condemnation thus undermines the Church's constitutional and statutory rights to introduce evidence of injury to the remainder of its property (Lots 4 through 10) pursuant to a cross-petition. Remainder or "severance" damages have long been viewed as an integral part of a landowner's constitutional compensation rights. In *Bowman v. Ross*, 167 U.S. 548, 574 (1896), this Court held:

> "The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation."

* * *

> "Consequently, when only part of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered."

To the same effect, see *United States v. Dickinson*, 331 U.S. 745, 750-751 (1947).

The scope of the right to severance damages has been well summarized by a leading commentator:

> "Every element of annoyance, inconvenience or disadvantage caused by the taking which would motivate a prospective purchaser both as to the advisability of purchasing the property, and as to the amount that he would pay therefor, are relevant factors in ascertaining the diminution in value of the remainder areas." 5 Nichols on Eminent Domain, Section 16-104 (1979).

It is pertinent to ask how any landowner can be in a position, through expert testimony or otherwise, to prove up the injury to its remaining property when the actual purpose of the primary taking is undisclosed? The necessity for this information is recognized in the Illinois Eminent Domain Act (Ch. 110, Sec. 7-124) which requires consideration of damage to the remainder "caused by . . . the proposed work . . ." The instant case is a curious departure from a long line of Illinois decisions which have always required such disclosure. For example, in *East Peoria Sanitary District v. TP&W Railroad*, 353 Ill. 296 (1933), the Illinois Supreme Court aptly observed:

> ". . . the practice has always been, in condemnation cases, to admit in evidence the plans of the work proposed to be done on the land taken, otherwise it could not be so well known how the projected improvement would effect the residue of the property." 353 Ill. at 304.

That Court added:

> ". . . what damages, if any, will the defendant sustain by reason of the construction of the proposed improvement in accordance with the plans of the petitioner? *To answer this question requires knowledge of those plans.*" 353 Ill. at 306. (Emphasis added).

Here, the Church sought at trial to prove up,[6] as best it could, potential damages to its remainder by presenting a number of possible injury "scenarios" which would accompany a range of possible hypothetical uses of the parking lot by the Commission or a medical institution. Though these scenarios were of necessity speculative, the Church and its expert witness maintained this quagmire was a direct consequence of the Commission's failure to divulge its plans, assuming *arguendo*, it had any:

> "Without knowing exactly what was going to be built there and what . . . [there] . . . was going to be, I have no real way of telling exactly what the damages would be to the remaining property." (Testimony of William Metz, M.A.I., Vol. VII at Tr. 122).

Given the Illinois Appellate Court's refusal to require the Commission to divulge its plans, the remand designed to resolve the question of damage to the remainder results in a paradoxical situation: any trier of fact will be hard-pressed to ascertain, and the Church will be rendered unable to prove, the source or amount of severance damages without resorting to rank speculation.

In the instant case, the Illinois Appellate Court seriously erred in affirming, on most issues, the trial court's decision and the Supreme Court of Illinois has likewise erred

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[6] Since the trial court denied the Church's cross-petition, these scenarios were presented in an offer of proof. (Appendix at A7-9).

in failing to grant review. The Church maintains that since the context of this case is one of a "partial taking", it has an absolute right to disclosure of a reasonably specific purpose as an essential element of its constitutional right to just compensation under the Fifth and Fourteenth Amendments.

CONCLUSION

For all of the reasons stated above, Petitioners, United Church of the Medical Center, and the Resident Bishop of the Chicago Area of the United Methodist Church, respectfully pray that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

SAMUEL W. WITWER, JR.*
SAMUEL W. WITWER, SR.
WITWER, MORAN, BURLAGE & WITWER
125 South Wacker Drive, Suite 2700
Chicago, Illinois 60606
(312) 332-6000

Attorneys for Petitioners

WALTER P. MAKSYM
Drake OakBrook Plaza
2211 York Road, Suite 208
Oak Brook, Illinois 60521
(312) 954-3848

Of Counsel

* Counsel of Record

APPENDIX A

Opinion of the Appellate Court of Illinois
First District, Fifth Division
No. 84-2435 — Filed March 31, 1986
142 Ill. App. 3d 498
491 N.E.2d 1327 (1st Dist. 1986)

STATE OF ILLINOIS MEDICAL CENTER COMMISSION, a body politic and corporate of the State of Illinois,

Plaintiff-Appellee,

v.

UNITED CHURCH OF THE MEDICAL CENTER, an Illinois religious corporation, et al.,

Defendants-Appellants.

Appeal from the Circuit Court of Cook County.
Honorable Arthur L. Dunne, Judge Presiding.

JUSTICE MURRAY delivered the opinion of the court:

After a bench trial, the circuit court of Cook County entered judgment for plaintiff State of Illinois Medical Center Commission (the Commission), approving the partial taking of real property from defendant United Church of the Medical Center (United Church) and awarding United Church $45,000 as just compensation for the property. On appeal, United Church argues: (1) the Commission's condemnation of the property was invalid because it failed to identify the purpose and proposed use or necessity for the taking of the property; (2) the condemnation proceedings were fatally infected with administrative bias and conflict of interest; (3) the trial court erred in its deter-

mination that United Church's fee-parking activity on the condemned property rose to the level of a secular use, thereby destroying its religious exemption status; and (4) the court erred in denying United Church's cross-petition for severance damages to the remainder property. United Church does not contest the valuation of compensation for the taken property. For the reasons set forth below, we affirm in part, reverse in part, and remand the cause for proceedings consistent with this opinion.

This case involves an eminent domain action instituted by the plaintiff Commission pursuant to the provisions of section 7-101 of the Illinois Code of Civil Procedure. (Ill. Rev. Stat. 1985, ch. 110, par. 7-101 *et seq.*) On May 28, 1980, the Commission filed a petition to condemn 3 of 10 lots, 150′ x 76′, utilized by United Church as a parking lot for its employees and parishioners' use and as leased parking to some of the area's medical personnel. The condemned property (the parking facility—Lots 1 through 3) is located at the southwest corner of Harrison Street and Ashland Avenue in Chicago, Illinois, and the remainder property (the sanctuary—Lots 4 through 10) directly to the south thereof. Various constituent organizations and officials of the United Methodist Church were included as party defendants and have joined with United Church to assert a common position in its behalf as the real party in interest and occupant of both the condemned property and the remainder.

The record discloses that the Medical Center District Act (the Act), created the plaintiff Commission and conferred on it jurisdiction over a medical center district located on the west side of Chicago. (Ill. Rev. Stat. 1979, ch. 111½, par. 5001 *et seq.*) The Act expressly authorizes the Commission to acquire by eminent domain property within the district's boundaries necessary for its purposes of establishing a medical center district. Section 5004 of

the Act exempts property owned by religious organizations which is used for religious purposes, but also empowers the Commission to acquire property which is "used for both religious and secular purposes." Ill. Rev. Stat. 1979, ch. 111½, par. 5004.

The record further reveals that the Commission's condemnation of the property was authorized by three resolutions enacted by the Commission on June 16, 1978, September 15, 1978, and December 14, 1979. The resolutions stated that the acquisition was for the "purpose" provided in the Act. During the pendency of this case, the Commission passed a fourth resolution on July 17, 1981, more definitively defining its purpose for taking the property as "medical institutional expansion."

In response to the petition to condemn, United Church filed an original and four amended traverses, alleging that the taking was invalid because:

> (1) the Commission could not and would not divulge its actual purpose in taking the property or any proposed use for the property;
>
> (2) the condemnation proceeding was fatally infected by a conflict of interest in that three of the four Medical Center commissioners who voted for the definitive resolution were impermissibly related to Rush-Presbyterian St. Luke's Hospital, the alleged "behind-the-scenes" moving force which induced the Commission to act; and
>
> (3) the property was an integral part of United Church's operation and it therefore was exempt from condemnation under the Medical Center District Act which expressly prohibits the taking of property owned by religious organizations, except parcels used for both religious and secular purposes.

On October 29, 1982, the trial court denied the traverse based on its determination that United Church's rental parking activity on the subject property was secular in nature and, accordingly, destroyed its religious exemption from condemnation of its property by the Commission. The court did not address the issues of the Commission's alleged failure or refusal to disclose the proposed use of the property or the alleged conflict of interest question.

On February 18, 1983, the trial court certified an interlocutory appeal by United Church pursuant to Supreme Court Rule 308. (Ill. Rev. Stat. 1985, ch. 110A, par. 308.) In its application for leave to appeal, United Church raised the issues of whether the Commission adequately identified the purpose of the taking, the ultimate use to be given the property and the necessity thereof, and whether United Church's parking activity was sufficient to deprive it of the statutory exemption against condemnation of religiously owned property. The application was denied by this court on May 8, 1983.

Trial of the matter was resumed by the court below in August 1984. United Church subsequently filed a cross-petition to recover severance damages to the remainder of its property, claiming curtailment of parking space, loss of ingress, light and frontage exposure. In its consideration of the cross-petition, the court stated that United Church's recovery of damages to the remainder was dependent upon whether the unities of use, contiguity and title existed between the property taken and the remainder on the date of the filing of the petition to condemn. The court found that even though United Church held title when it filed its cross-petition, it lacked title at the time of the filing of the petition to condemn on May 28, 1980. At that time, title to the remainder property was held by a predecessor Methodist congregation

and later a Presbyterian church, both having been part of a combined Methodist/Presbyterian program conducted by United Church on the sanctuary property. Accordingly, the court entered judgment in favor of the Commission, approving the condemnation of Lots 1 through 3 and awarding United Church $45,000 as just compensation for the taking of the property.

We first address United Church's contention that the failure of the Commission to specify or identify the purpose or use to which it intends to put the condemned property contravenes the Eminent Domain Act. (Ill. Rev. Stat. 1985, ch. 110, par. 7-102.) United Church argues that in the absence of an announced purpose tied to any future use and necessity, the Commission lacked authority to condemn its property. It relies on *People v. YWCA* (1981), 86 Ill. 2d 219, 427 N.E.2d 70, which addressed the existence or absence of a public purpose, future use and necessity as requisites for a taking of property. There, in finding that the condemning body failed to show a necessity for the taking for a courts' complex, our supreme court held that although the question of necessity is essentially within the power of the condemning body, a court may and should upon a traverse on the property inquire into the necessity for the use to determine whether the condemning body acted arbitrarily.

In the present case, the Commission asserts it did not act arbitrarily and that its condemnation of the subject property for medical purposes is a legally adequate specification for the taking even though the ultimate medical use or uses of the property have not as yet been determined. In support of this contention, it cites *City of Chicago v. Barnes* (1964), 30 Ill. 2d 255, 195 N.E.2d 629, which held that condemnation powers are properly exercised if the express use is for a public purpose even

though the ultimate use or uses has not as yet been determined at the time of condemnation.

We believe no conflict exists between the Commission's position and that of United Church. Where the condemning body makes a determination of necessity for a public body to take property for a proper public purpose, the ordinance or resolution establishing the necessity creates a *prima facie* case of need for the taking in the traverse action. (*City of Chicago v. Barnes* (1964), 30 Ill. 2d 255, 195 N.E.2d 629.) If the condemning body fails to specifically make such a determination, it is not fatal to the condemnation procedure provided the evidence presented by the condemning body in the traverse hearing discloses a necessity. (*People v. YWCA* (1981), 86 Ill. 2d 219, 427 N.E.2d 70.) As our supreme court stated in *YWCA*,

> "the absence of a legislative finding of necessity would not be fatal if it were otherwise unequivocally established by the record that the property was necessary for Sangamon County circuit court use. The case turns on whether, lacking such legislative determination, the record contains such evidence to support the trial court's implicit finding that necessity existed." 86 Ill. 2d 219, 240.

Here, the General Assembly, in enacting the Medical Center District Act creating the Commission, specifically authorized the Commission to exercise eminent domain powers to carry out its purpose with respect to property within the district. (Ill. Rev. Stat. 1979, ch. 111½, par. 5004.) We agree, as the Commission argues, that a medical purpose is a public purpose sufficient to sustain an eminent domain action even though the ultimate use or uses of the condemned property has not as yet been determined. (*City of Chicago v. Barnes* (1964), 30 Ill. 2d 255, 195

N.E.2d 629.) The Commission's 1981 resolution stating the purpose of the acquisition to be for medical institutional expansion was sufficient to establish a *prima facie* case of need. The burden was then on United Church to demonstrate that the Commission acted arbitrarily in the matter.

We thus come to United Church's next argument that the Commission did act arbitrarily. United Church alleges that three members of the Commission who participated in the enactment of the resolutions for the condemnation of the subject property had a conflict of interest precluding their participation in the proceedings before the Commission which resulted in the authorization of the condemnation action. United Church charges that Commissioners Livingston, Hoffman and Roach have important links to Rush-Presbyterian St. Luke's Hospital and that their participation in the resolution proceedings was intended to benefit Rush which was having an expansion problem.

Absent evidence of fraud, courts ordinarily do not inquire into the interest, bias or motives of a municipal body acting in a legislative capacity. (*Chicago Park District v. Kenroy* (1980), 78 Ill. 2d 555, 402 N.E.2d 181.) Here, United Church neither alleges fraud, nor has any evidence been presented disclosing fraud by Livingston, Hoffman or Roach. Moreover, with regard to Livingston's, Hoffman's and Roach's conflict of interest because of their alleged links with Rush, we note that the Medical Center District Act provides for public hearings in the event the Commission decides to convey real property, as well as judicial review of any decision of the Commission in such a case. (Ill. Rev. Stat. 1979, ch. 111½, pars. 5009, 5010, 5015.) Accordingly, any conflict of interest by Livingston, Hoffman or Roach can be raised by defendant or other interested parties in the required public hearing if the

Commission attempts to lease or convey the subject real estate to Rush.

We also reject United Church's contention that the trial court erred in finding the condemned property was not used solely for religious purposes. It argues that the income derived from the use of the property for rental parking was "miniscule" and, therefore, did not rise to the level of secular use.

The Act creating the Commission expressly permits it to condemn a religious institution's property if it is used for "both religious and secular purposes." (Ill. Rev. Stat. 1979, ch. 111½, par. 5004.) Here, the record discloses that United Church continually leased space in the parking lot to personnel working in the Medical Center, Monday through Friday. Even though United Church's use of the property primarily might have been for religious purposes and as a parking facility for the use of its employees and parishioners, the fact that the property also was used for secular purposes part of the time is sufficient to deprive it of its religious exemption status. In addition, we note that the fact that the income received from the rental parking was devoted to religious purposes is not sufficient to make United Church's use of the subject property a religious use. *Scripture Press Foundation v. Annunzio* (1953), 414 Ill. 339, 111 N.E.2d 519.

Accordingly, because of our determination that the Act and resolutions disclose a public purpose and need for the eminent domain proceedings and no evidence has been presented revealing arbitrary enactment of the resolutions, as well as the fact that United Church's rental parking activity was of a secular nature, we affirm the trial court's judgment condemning the subject property.

Finally, United Church argues that the trial court's denial of its cross-petition for severance damages to its remainder property was error and infringed on its right to just compensation guaranteed by the fifth and fourteenth amendments of the United States Constitution (U.S. Const., amends. V, XIV) and article I, section 15 of the Illinois Constitution (Ill. Const. 1970, art. I, sec. 15). We agree. The trial court's sole reason for denying the cross-petition was its belief that all three unities of use, contiguity and title must have existed between the condemned property and the remainder at the time of the initial filing of the petition to condemn. Finding that United Church lacked unity of title at the time of filing the condemnation petition, the court denied its cross-petition, even though it fulfilled the two requisite unities of use and contiguity—the parking lot was used by its parishioners and employees and adjoined the sanctuary property. United Church's only apparent remedy therefore for injury to its remainder as a result of the use of the taken property by the Commission, based on its subsequent acquisition of title to the remainder, would be an action at law when the damage, if any, occurs. *Department of Transportation v. McGovern* (1982), 103 Ill. App. 3d 461, 464, 431 N.E.2d 437.

Despite the foregoing, no Illinois case law exists as to *when* unity of title is determined for the purpose of valuation of the condemnee's loss or injury by reason of the taking of his property in eminent domain. In *Department of Conservation v. Franzen* (1976), 43 Ill. App. 3d 374, 356 N.E.2d 1245, this court was confronted with the issue of whether beneficiaries under separate land trusts to certain parcels, were precluded from recovery of severance damages to their remainders because of an alleged lack of unity of title. We held that even though the benefici-

aries did not hold legal title, they each possessed a *beneficial interest* in the property condemned and, therefore, unity of ownership *or interest* was satisfied and the beneficiaries had standing to seek severance damages to their property. In making this determination, we considered the basic question whether in light of relevant statutory and constitutional provisions the ends of justice would be served by permitting the damages to property not taken to be considered in the same proceedings in which just compensation for taken property was to be determined. We concluded that it appeared to us that "the paramount constitutional requirement of just compensation must be allowed to prevail over the niceties of legal title advanced by the State." (See also *Erly Realty Development, Inc. v. State* (1974), 43 App. Div. 2d 301, 351 N.Y.S.2d 457; *cf. M.T.M. Realty Corp. v. State* (Ct. Cl. 1965), 47 Misc. 2d 44, 261 N.Y.S.2d 815.)" 43 Ill. App. 3d 374, 384.

We also observe that none of the constitutional or Illinois statutes require or refer to the legal title holder or at what time in an eminent domain proceeding the unity of title or interest in property taken or damaged is to be determined. The fifth amendment of the United States Constitution provides private property shall not be taken for public use, without just compensation. (U.S. Const., amend. V.) The Illinois Constitution states "[p]rivate property shall not be taken or damaged for public use without just compensation." (Ill. Const. 1970, art. I, sec. 15.) Illinois' Eminent Domain Act provides that "[p]rivate property shall not be taken or damaged for public use without just compensation" and "any person * * * [who] is the owner *or has an interest in property*, * * * which will be taken or damaged" may become a party to the condemnation proceedings by filing a cross-petition, the rights of such party "thereupon to be fully considered and

determined." (Emphasis added.) Ill. Rev. Stat. 1985, ch. 110, pars. 7-101, 7-124.

We also note that it is well settled condemnation law that all persons having any right, *title or interest* in the premises should be made parties to a condemnation action. *Chicago, North Western R.R. Co. v. Miller* (1911), 251 Ill. 58, 95 N.E. 1027.

Here, it is clear that United Church has an interest in the remainder property. For at least 12 years it has had the authority to control, manage and use the property and, in fact, possessed legal title to the property at the time the trial court entered its condemnation judgment. We hold therefore, in light of the above constitutional, statutory and case law relating to eminent domain, that the trial court erroneously concluded that United Church lacked unity of legal title which precluded it from filing its cross-petition for severance damages to the remainder.

For the foregoing reasons, the trial court's judgment condemning the subject property is affirmed, the court's denial of United Church's cross-petition is reversed, and the cause is remanded for a determination of the damage, if any, due United Church to the remainder of its property occasioned by the taking.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

SULLIVAN, P.J., and PINCHAM, J., concur.

APPENDIX B

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of September, 1986.

Present: William G. Clark, Chief Justice
Justice Daniel P. Ward — Justice Joseph H. Goldenhersh
Justice Howard C. Ryan — Justice Thomas J. Moran
Justice Seymour Simon — Justice Ben Miller

On the second day of October, 1986, the Supreme Court entered the following judgment:

No. 63474

State of Illinois Medical Center Commission, a body politic and corporate of the State of Illinois,

Respondent

v.

United Church of the Medical Center, an Illinois religious corporation, et al.,

Petitioners

Petition for Leave to Appeal from the Appellate Court First District 1-84-2435 80L12323

The Court having considered the Petition for Leave to Appeal and being fully advised of the premises, the Petition for Leave to Appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this twenty-fourth day of October, 1986.

/s/ Juleann Hornyak
Clerk
Supreme Court of the
State of Illinois

APPENDIX C

(Letterhead Of)

State of Illinois
SUPREME COURT CLERK
Supreme Court Building
Springfield 62706

December 1, 1986

Witwer, Moran, Burlage & Witwer
Mr. Samuel W. Witwer, Jr.
125 S. Wacker Dr., S#2700
Chicago, IL 60606

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 63474—State of Illinois Medical Center Commission, etc., respondent, v. United Church of the Medical Center, etc., et al., petitioners.

Motion by petitioners for leave to file a motion for reconsideration of the order denying petition for leave to appeal. Motion *denied.* Simon, J., took no part.

cc: Michael D. Leroy

JH/dec

APPENDIX D

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

STATE OF ILLINOIS MEDICAL CENTER COMMISSION, a body politic and corporate of the State of Illinois,

Petitioner,

No. 80 L 12323 v.

DONATA PASQUALE, et al.,

Defendants.

ORDER
(Entered October 29, 1982)

This cause coming before the Court for hearing on Defendants' Traverse and Motion to Dismiss, as amended, and the Court having heard evidence, both oral and documentary, and having heard the arguments of counsel, and being fully advised in the premises:

IT HEREBY ORDERED, that the Defendants' Traverse and Motion to Dismiss, as amended, be and is hereby denied;

It is further ordered that this cause be set for status report on December 2, 1982 at 10:00 a.m.

Enter: /s/ Arthur L. Dunne
Judge

APPENDIX E

EXCERPT OF TRANSCRIPT OF PROCEEDINGS (PAGES 72 *ET SEQ.*) OF AUGUST 21, 1984

[72] "MR. WITWER: May the record show had I been given the opportunity to recall Reverend Constantino on the issue of damages to the remainder; that is, lots 4 through 10, he would have testified that the church has repeatedly and over the period of the last nearly four years sought but failed to obtain from the Medical Center Commission any designation of proposed use of the property taken.

However, if the property taken ultimately is used for any purpose other than that of a flat or multi-story parking garage, that it would cut the church's available parking capacity in half and would have a very dilatorious effect on the ability of the church to continue in operation and would curtail growth and in fact would cause impairment of membership because of the relative inaccessibility [73] of on-street parking and the alternative to the parishioner which would be to pay money for commercially offered parking in the area.

Further, the testimony would have established that if the proposed use which is as yet unknown by the Medical Center Commission proved to be—to include the west alleyway to the reat (sic) of the property taken so as to block that alleyway, the church would be left with but a single point of egress and ingress; namely, for a parishioner to travel southbound on Ashland Avenue and make a turn into the sole remaining parking lot to the south of the church building.

The other means of access which has long been used involves an ability of a parishioner to come in through the alleyway right behind lots 1, 2, and 3 whether they are traveling east or west on Harrison Street.

Finally, the Reverend would testify that depending on the use given to the corner lot ultimately by the Commission or its designee, the church's excellent vista and visibility to the entire district on one of its prime corners, Ashland and Harrison, which at the present time is open [74] and perhaps even arresting to an oncoming motorist, there would be interposed between the church and the public some form of structure that would materially curtail light, air, view both outward from the church and inward from the adjoining neighborhood.

I would like further to indicate that the offer of proof would be that because the Commission has not favored the church with any kind of bill of particulars for four years, that the church would not have been able to calculate with any reasonable certainty the pecuniary impact on the market value of its remainder due to these speculative potential events.

I would also like to make an offer of proof for my appraiser, Mr. Metz, who was prepared to testify and would have testified to the variety of conforming uses in his understanding which would have been permissible on this lot that is being taken from us by the Medical Center Commission which would include among other things—

MR. LEROY: Your Honor, if I may—

MR. WITWER: I am about done, your Honor.

MR. LEROY: If I may, your Honor, I believe [75] Mr. Metz will testify. Is that correct?

MR. WITWER: Yes, but he won't be able to testify about the remainder.

MR. LEROY: But he would be able to—

THE COURT: He can testify in the form of an offer of proof.

MR. LEROY: For the record, I would object to the testimony indicated by Mr. Witwer as far as Reverend Constantino's testimony insofar as I believe that that testimony would have been speculative and that it could have contained items which—items of damage which were non-compensable.

THE COURT: I will let it stay on the record as an offer of proof.

MR. WITWER: That's precisely our point . . ."

APPENDIX F

DEFENDANTS' GROUP EXHIBIT 2

AGENDA

MEDICAL CENTER COMMISSION

RUSH-PRESBYTERIAN-ST. LUKE'S
PROFESSIONAL BUILDING
1725 W. Harrison Street
Chicago, Illinois 60612

SEPTEMBER 15, 1978

12:30 P.M.

		Page
1.	Roll Call	
2.	Minutes—Meeting June 16, 1978	
3.	Report of the Executive Director	1-3
4.	Financial Statement	4-27
5.	Old Business	

A. Matters relating to Union Health Services Inc. Site—Oakley, Congress, Leavitt & Harrison Streets

B. Request of Commonwealth Edison for site to build transmission and distribution sub-station.

C. Condemnation of vacant land at South-west corner of Harrison Street and Ashland Boulevard (Request of RPSL)

D. Amendments to Medical Center District Act—Chapter 91, Sections 125 to 136, Illinois Revised Statutes:

Use and allocation of Commission funds:

a. Chapter 91 Section 134 Illinois Revised Statutes of 1973 (See Director's Report)

b. That Section 134 of Chapter 91—Illinois Revised Statutes be amended to allow for use of monies for land sales to be used in the District and that all Monies received be used for "operations, maintenance and improvements of property without restriction.

E. Illinois Administrative Procedure Act Certification of Rules

F. Request of Board of Commissioners of Cook County, Illinois to acquire land to construct Institute of Forensic Medicine

G. Authorize conveyance to American Society of Clinical Pathology of additional land—West half of block bounded by West Congress Place, South Hoyne Avenue, West Harrison Street and South Leavitt Street

APPENDIX G

EXHIBIT X TO DEFENDANTS' BRIEF IN SUPPORT OF SECOND AMENDED TRAVERSE FILED APRIL 15, 1981

(Letterhead Of)

FRIEDMAN & KOVEN
208 South LaSalle Street
Chicago, Illinois 60604

September 19, 1978

William F. Scannell
General Counsel
Medical Center Commission
736 South Ashland Avenue
Chicago, IL 60607

Re: United Church of the Medical Center

Dear Bill:

I have requested a "necessary parties" search out of Unit 20 at Chicago Title with respect to the property at the southwest corner of Ashland and Harrison (lots one through four which should include all of the vacant). The search will be mailed directly to you by Unit 20.

Very truly yours,
/s/ George W. Davis

GWD/mkc

bbc: Robert J. Zimmerman
Oscar O. D'Angelo

APPENDIX H

DEFENDANTS' EXHIBIT 8

(Letterhead Of)
FRIEDMAN & KOVEN
208 South LaSalle Street
Chicago, Illinois 60604

November 5, 1979

BY MESSENGER

Mr. Raymond J. Bayster
Executive Director
Medical Center Commission
736 South Ashland Avenue
Chicago, IL 60607

Re: United Medical Center
Church Parking Lot

Dear Ray:

Now that the Commission's acquisition of the vacant land north of the United Medical Center Church building currently utilized for parking is "back on track", I am enclosing a copy of a "necessary parties" search (no. 66-17-595). A copy was previously supplied to Bill Scannell.

In instituting a condemnation action, please do not forget that the portions of the vacated alley to the west of the parcels in question are to be included in the action.

If you have any questions, please do not hesitate to call.

Very truly yours,
/s/ George W. Davis

GWD/mkc
enclosure

cc: William H. Roach, Jr., Esq.
Oscar O. D'Angelo, Esq.

APPENDIX I

DEFENDANTS' EXHIBIT 9

(Letterhead Of)

FRIEDMAN & KOVEN
208 South LaSalle Street
Chicago, Illinois 60604

March 17, 1980

Raymond J. Bayster
Executive Director
Medical Center Commission
736 South Ashland Avenue
Chicago, IL 60607

Re: United Medical Center Church

Dear Ray:

As we previously discussed, I have checked into the history behind the dissolution of the I.M.C. Wesley Foundation, a not-for-profit corporation of Illinois. Enclosed, herewith, is a copy of the Final Articles Of Dissolution filed on April 1, 1970 with the Office of the Secretary of State. Therefore, it is clear that the voluntary dissolution may not now be revoked (see Section 47 of the Illinois Not-For-Profit Act enclosed, herewith) and that the dissolution was not involuntary and as a result of the failure to pay any corporate taxes.

There may be a formal plan of liquidation in existence, but such a plan need not be filed with the Secretary of State's Office. You may be able to obtain a copy of the plan if one exists once the Commission institutes an action to assert its right of re-entry.

Very truly yours,
/s/ George W. Davis

GWD/mkc

enclosures

cc: Edward Scott
bcc: William H. Roach, Jr., Esq.
Donald Oder

APPENDIX J

EXHIBIT 2 OF APPENDIX FILED WITH SEVENTH CIRCUIT COURT OF APPEALS BY RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER IN CAUSE NOS. 81-2887 AND 82-1211, CONSOLIDATED

GARDNER, CARTON & DOUGLAS
ONE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60803
AREA CODE 312 726-2452
CABLE-GARCAR
TELEX 28-2628

January 14, 1982

Mr. Park Livingston
President
Medical Center Commission
736 South Ashland Avenue
Chicago, Illinois 60607

Dear Park:

Questions have arisen in Federal Court litigation involving the Medical Center Commission, the Wesley Foundation and the United Church of the Medical Center as to whether I would be able to act fairly and impartially as a Commissioner in deciding matters concerning the Wesley Foundation and the United Church of the Medical Center. It is suggested that, as a former officer of Rush-Presbyterian-St. Luke's Medical Center ("RPSLMC") and as a partner of the law firm that serves as RPSLMC's general outside counsel, I would be unable to do so.

While I believe I can act with complete fairness and impartiality in these matters and that no evidence exists to prove otherwise, I would prefer to recuse myself from proceedings involving Wesley Foundation and the United Church of the Medical Center. The additional controversy and delay that

would likely ensue should I participate in these matters is unnecessary, and, therefore, I request that you permit me to withdraw.

Sincerely,

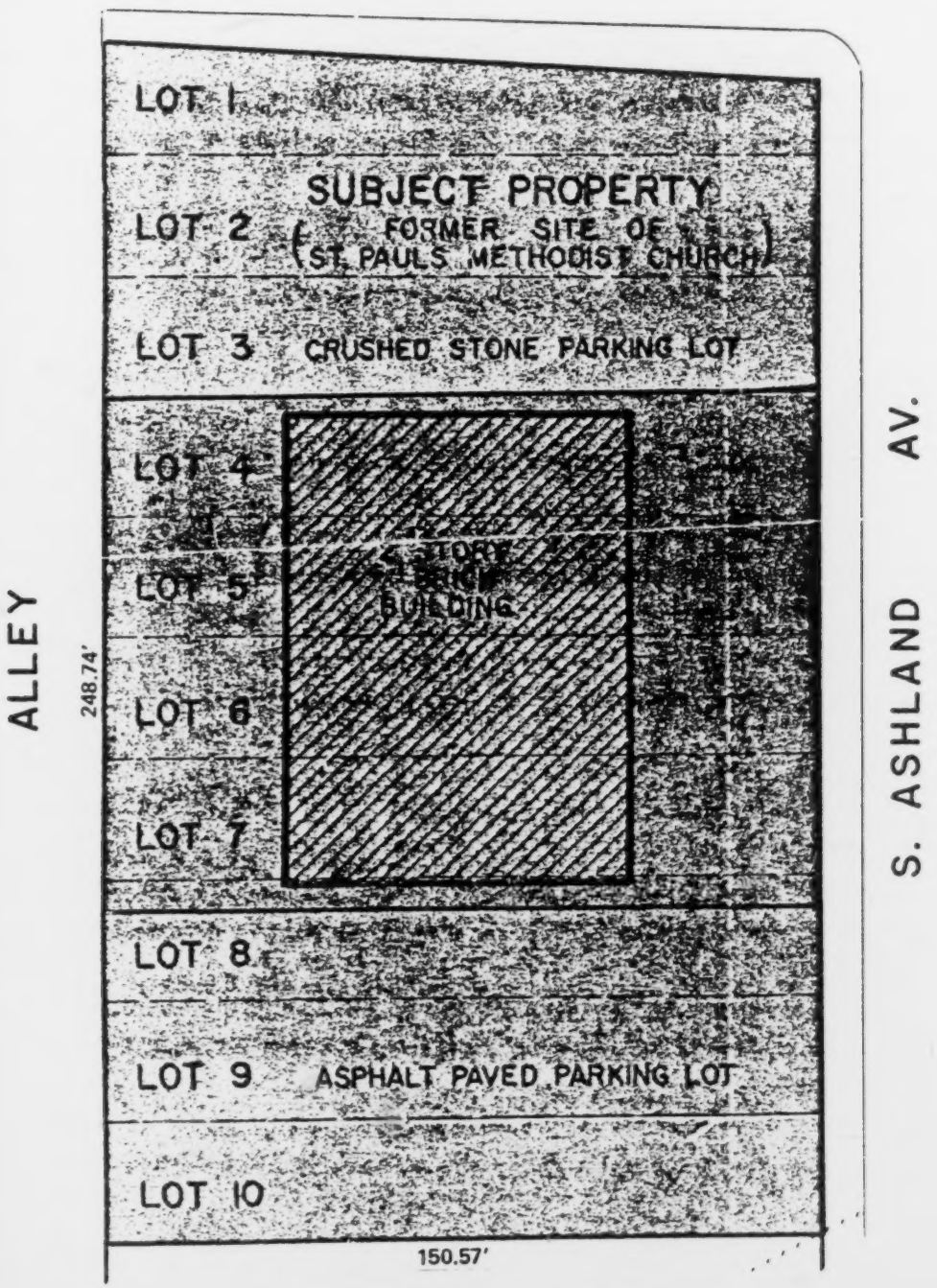
/s/ WILLIAM H. ROACH, JR.

WHR/dr

cc: Joseph H. Brown, M.D.
Mr. Charles J. Burg
Samuel J. Hoffman, M.D.
Kenneth D. Schmidt, M.D.
Edward Scott, Esq.

APPENDIX K

DEFENDANTS' EXHIBIT 5



Site Plan Of Entire Property

APPENDIX L

DEFENDANTS' EXHIBIT 7

AGENDA

STATE OF ILLINOIS
MEDICAL CENTER COMMISSION

June 18, 1982
1:30 P.M.

Rush-Presbyterian-St. Luke's Medical Center
Board Room
1725 W. Harrison Street
Chicago, Illinois 60612

		Page Number
1.	Roll Call	
2.	Minutes—Meeting April 2, 1982	1
3.	Report of Executive Director	2-6
4.	Financial Statement—March, April and May	(a)-(dd)
5.	Old Business	
	A. Report of Standing Committees	
	1. Legal Affairs—Dr. Kenneth D. Schmidt Chairperson.	
	a. Reverter Hearings	
	1. Westminster Foundation—No. 76-1	
	2. Wesley Foundation (United Church of Medical Center) No. 80-1	

3. Dual land request of Amusement and Janitor's Local #25 and Rush-Presbyterian St. Luke's Medical Center for property commonly known as Easter Seal site and Bishop Anderson site and Commission—owned property south of Easter Seal to Polk Street

4. University of Health Sciences/The Chicago Medical School—property at Ogden, Polk, Hoyne, Harrison and Damen

* * * * *

c. Eminent Domain

1. Acquisition of University Inn property—Circuit Court of Cook County No. 80 L 17625



2. Acquisition of St. Paul's Methodist property, 600-606 S. Ashland, and determination of ultimate use, Circuit Court of Cook County No. 80 L 12323

Emphasis arrow added by Petitioner.

Supreme Court, U.S.
FILED
FEB 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED CHURCH OF THE MEDICAL CENTER, an Illinois religious corporation, **THE UNITED METHODIST BISHOP OF THE CHICAGO AREA**, et al.,

Petitioners,

v.

STATE OF ILLINOIS MEDICAL CENTER COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

EARL L. NEAL
111 West Washington Street
Suite 1010
Chicago, Illinois 60602
(312) 641-7144
Counsel of Record for Respondent

MICHAEL D. LEROY
RICHARD F. FRIEDMAN
EARL L. NEAL & ASSOCIATES
Of Counsel

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

LIST OF PARTIES

The respondent is the State of Illinois Medical Center Commission, a body politic and corporate of the State of Illinois. It was created pursuant to "An Act in relation to the establishment of a medical center district in the City of Chicago and for the control and management thereof," approved June 4, 1941 (excerpts from this statute appear in the Appendix hereto at A1).

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NO FEDERAL OR CONSTITUTIONAL QUESTIONS WITH RESPECT TO THE "CONFLICT OF INTEREST" WERE RAISED OR DETERMINED BELOW; TWO COURTS FOUND NO CONFLICT OF INTEREST	6
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Board of Junior College v. Carey, 43 Ill.2d 82, 250 N.E.2d 644 (1969)	8
City of Crystal Lake v. LaSalle National Bank, 121 Ill.App.3d 364, 459 N.E.2d 643 (1984) ..	8
Fry Roofing Co. v. Wood, 344 U.S. 157 (1952) ..	7
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North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	9
Portland Ry. Co. v. Railroad Commission of Oregon, 229 U.S. 397 (1913)	7
San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981)	9

Statutes

An Act in relation to the establishment of a Medical Center District in the City of Chicago and for the control and management thereof, 1941 Ill. Laws v.1, p.303 (1941) 2, 9, 10

Ill. Rev. Stat. 1979, ch. 111½, par. 5004 3

Ill. Rev. Stat. 1979, ch. 111½, par. 5009 ..... 4, 9

Title 28 U.S.C. Section 1257(3) 1, 2, 7, 8, 9

Other Authorities

4 J. Sackman, Nichols' The Law of Eminent Domain § 12.32[4][b] & § 2.1 n.1 (Rev. 3d Ed. 1985 & Supp. 1986) 3

28 Am. Jur. 2d Eminent Domain § 78 3

29A C.J.S. Eminent Domain § 65 3

In The

Supreme Court of the United States

October Term, 1986

UNITED CHURCH OF THE MEDICAL CENTER, an Illinois religious corporation, THE UNITED METHODIST BISHOP OF THE CHICAGO AREA, et al.,

Petitioners,

v.

STATE OF ILLINOIS MEDICAL CENTER COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

The petitioners assert jurisdiction pursuant to Title 28 U.S.C. Section 1257(3). Jurisdiction is not this court, however, because,

(1) The court below neither ruled on nor was asked to rule on any federal constitutional issue with respect to the alleged conflict of interest of members of the respondent Commission;

(2) The judgment below is not final in that the Illinois Appellate Court remanded the case for the determination of damages, if any, to the remainder and the respondent is unable to take title or possession of the property in question until just compensation is determined and paid.

STATUTES INVOLVED

An Act in relation to the establishment of a Medical Center District in the City of Chicago and for the control and management thereof, approved June 4, 1941 (Ill. Rev. Stat. 1979, ch. 111½, pars. 5001-5022) (the "Medical Center Act"). Excerpts from the original statute creating the respondent Commission and enumerating its powers appear in the Appendix hereto at A1. Excerpts from the statute in effect at the time of the respondent Commission's acquisition resolution appear at A3.

STATEMENT OF THE CASE

The respondent State of Illinois Medical Center Commission is the governing body of the Medical Center District established by the Illinois General Assembly in 1941. The preamble to the enabling legislation set forth the legislative findings of the reasons for creating the Commission: A center of medical activity had grown up in the near west side of Chicago, an area of blight, and the Commission is to protect the area from further deterioration and to provide an environment to stabilize, retain and pro-

vide expansion for the large private investments in hospitals, clinical and research facilities of the area. *See*, Appendix A1.

The Medical Center District is now the largest medical complex in the world. It contained approximately 365 acres in 1982 (Transcript of trial proceedings ("Tr."), v.1, p.49). Within this compact area, there are 53 hospitals, medical schools, church facilities and care institutions. (Tr., v.1, p.57.) These include the University of Illinois Medical Center, Cook County Hospital, Rush-Presbyterian St. Luke's Medical Center, Illinois State Psychiatric Institute, Illinois Pediatric Institute, the National Society for Crippled Children, the Cook County Institute for Forensic Medicines, Chicago Lighthouse for the Blind and the Veterans Administration West Side Medical Center.

The respondent Commission is authorized by statute to acquire the fee simple title to real property lying within the district for its purposes, including any parcel of real property used for both religious* and secular purposes. Medical Center Act, Section 3, A5. The real property at issue was used as a parking lot and the spaces were rented out on a monthly basis to hospital employees. It was therefore subject to acquisition because of its secular purposes. In the proceedings below, the petitioners denied the secular purposes of the parking lot, but the question was resolved against them at trial and in the Illinois Appellate Court (Petition A8) and is not raised in the ques-

* The petitioners (Petition, p. 3) disclaim knowledge of contested takings of religious property. But acquisition of such property is common and frequently raises the question of valuation of churches as "special use" property. *See, e.g.*, 4 J. Sackman, Nichols' Law of Eminent Domain (Revised 3d Ed. 1985) § 12.32[4][b] and § 2.1 n.1 (Supp.). *See also* 28 Am. Jur. 2d Eminent Domain § 78 p. 736; 29A C.J.S. Eminent Domain § 65 p. 311.

tions presented to this Court. By a resolution enacted July 17, 1981 (Plaintiff's exhibit no. 3), the respondent Commission authorized the acquisition of the subject property for the purposes provided in the Medical Center Act.

The petitioners claim that the respondent's proceedings were "totally infected" by administrative bias in that the only reason for the respondent's acquiring this parcel was to hand it over to a hospital within the district, Rush-Presbyterian-St. Luke's Medical Center ("Rush Hospital"). The petitioners were totally unsuccessful below in showing any official connection between Rush Hospital and the proposed acquisition. No contract, resolution or any other official action, whether preliminary or otherwise, conveying or promising to convey the property to Rush Hospital was ever offered in evidence. Rather, the trial testimony unequivocally and uncontradictably demonstrated that there was no certainty that, after the acquisition, the property is to be conveyed to Rush Hospital.

The respondent's executive director testified that pursuant to Section 6 of the Medical Center Act (A6), the ultimate disposition and use of the property would not be determined until after a use value hearing was held. Following the statutory use value hearing, the respondent Commission determines the identity of a grantee, the value for which the property will be sold to such grantee and the permissible uses for such property. It was not unusual for acquired property to be conveyed after such hearing to a user other than the person originally requesting the condemnation. Tr., v.1, pp.48-9; v.3, pp.23-24, 36.

The petitioners see an invidious conspiracy in Rush Hospital's advocacy of the acquisition and the hospital's furnishing information about the subject property to the respondent Commission. But these acts of advocacy or cooperation do not create a vested right in Rush Hospital.

The petitioners were unable to demonstrate below that the respondent Commission had made any binding commitment regarding either the disposition or the allowable future uses of the property subsequent to acquisition. Tr., v.1, p.38, 43, 55-6.

In this Court and below, the petitioners alleged that a conflict of interest existed because of connections the petitioners saw between members of the respondent Commission and Rush Hospital. Since there is no legal obligation upon the respondent Commission to convey the property to Rush Hospital nor has the respondent Commission made such a decision, the Illinois Appellate Court (Appendix A7) found it irrelevant whether or not any members of the governing body of the respondent Commission were connected to Rush Hospital.

Moreover, the connections are tenuous at best. Two commissioners are said to have "important links to Rush." Petition, p.12. They are officers of the Chicago Foundlings Home, a welfare agency having contractual relations with Rush Hospital. Tr., v.3, pp.30-32. The other alleged conflict was that of a commissioner who was a member of a law firm which represented Rush Hospital. Neither the trial court nor the Illinois Appellate Court concluded that a conflict of interest existed. The Illinois Appellate Court noted that this issue "can be raised by [petitioners] or other interested parties in the required public hearing if the Commission attempts to lease or convey the subject real estate to Rush." Appendix A7.

At the condemnation trial, the court denied all four of the petitioners' traverses (motions to dismiss for want of authority to condemn). The petitioners also filed a cross-petition seeking compensation for damage to the remainder of the property, since the parking lot being condemned composed approximately one-third of the parcel. The trial

court denied the cross-petition and did not admit any evidence as to the damage to the remainder of the subject property. On appeal, the Illinois Appellate Court held that the cross-petition should have been permitted. The court reversed the trial court on that issue and remanded the case for trial upon the question of damages, if any, to remainder.

This case is now pending in the Circuit Court of Cook County, Illinois, to be set for trial on the issue of damage to remainder. The mandate of the Illinois Supreme Court with respect to its denial of leave to appeal was issued October 24, 1986. The Illinois Appellate Court issued its mandate to the Circuit Court of Cook County, Illinois, November 14, 1986. Petitioners sought no stay of the mandates.

REASONS FOR DENYING THE WRIT

I.

NO FEDERAL OR CONSTITUTIONAL QUESTIONS WITH RESPECT TO THE "CONFLICT OF INTEREST" WERE RAISED OR DETERMINED BELOW; TWO COURTS FOUND NO CONFLICT OF INTEREST.

The Illinois Appellate Court disposed of the conflict of interest argument in two paragraphs on the grounds that, without evidence of fraud, the courts cannot inquire into the motives of municipal officers and that the question of interest was premature. Petition, A7-8. The Illinois Appellate Court did not consider any constitutional questions because the petitioners raised none below. Their entire argument to the appellate court was based on state law questions and state cases; due process and the federal constitution were not mentioned. See argument of the peti-

tioners to the Illinois Appellate Court on this issue, the entire text of which is set forth in the Appendix A10-12. Because the petitioners failed to raise any federal or constitutional grounds in the review before the highest court of the state, those issues are waived and there is no jurisdiction under Title 28 U.S.C. Section 1257(3). *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Beaty v. Richardson*, 276 U.S. 599 (1928); *Beck v. Washington*, 369 U.S. 541, 553 (1962).

The recognition of their failure to raise any federal or constitutional issue below is apparent from the failure of the petitioners to observe Rule 21.1(h), which requires that a petitioner must specify "the stage in the proceedings, both in the court of first instance and the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; . . . ."

The petitioners were unable to convince the trial court or the Illinois Appellate Court that the respondent Commission's proceedings were infected by a conflict of interest. The facts upon which the alleged conflict of interest were based were found not to be pertinent by either court and both courts rejected any conclusion that the acquisition of the subject property was a result of a secret prearrangement to force the property from the petitioners and turn it over to Rush Hospital. The petitioners now seek to have this Court "undertake to review concurrent findings of fact by two courts," *Graver Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). But the questions of fact and the conclusionary findings of the state court may not be re-examined. *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *Portland Ry. Co. v. Railroad Commission*, 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952).

II.

THIS CASE DOES NOT MEET THE FINALITY REQUIREMENTS OF TITLE 28 U.S.C. SECTION 1257 BECAUSE THERE IS NO FINAL JUDGMENT; THE CASE WAS REMANDED FOR A NEW TRIAL WITH RESPECT TO THE DAMAGE TO THE REMAINDER.

The Illinois Appellate Court (Petition A9-11) held that the trial court improperly dismissed the petitioners' cross-petition, which sought the determination of damage to the property not taken in the condemnation proceeding. The Illinois Appellate Court, although affirming the right of the respondent Commission to acquire the parking lot, ordered that "the cause is remanded for a determination of the damage, if any, due United Church to the remainder of its property occasioned by the taking."

There is no final judgment in this case. The respondent Commission is unable to acquire petitioners' property or interfere with any of their property rights until the entry of a final judgment determining the amount of just compensation and the payment by the respondent Commission of the full amount due as compensation for the property damaged and taken. *Board of Junior College v. Carey*, 43 Ill.2d 82, 250 N.E.2d 644, 646 (1969); *City of Crystal Lake v. LaSalle National Bank*, 121 Ill.App.3d 364, 459 N.E.2d 643 (1984). Until such time as the determination of the award and the full deposit thereof, the petitioners enjoy the full use and benefit of the property.

The petitioners argue that they will be deprived of the constitutional right to just compensation in the subsequent trial court proceedings because they will be unable to determine the use to which the subject property will be put, and such use is an important element in an appraiser's determination of damage to remainder. That petitioners will be unable to prove damages or that they will be dis-

satisfied with the award of just compensation for damage to the remainder made by the trial court after remand is speculation. There is no showing that the damage to remainder could not be calculated upon the development of the subject property consistent with the uses permitted under the Medical Center Act, the applicable zoning, building and area-development codes.

This kind of case, with an issue still to be determined at trial, is not final for the purposes of Title 28 U.S.C. Section 1257. In an eminent domain case, "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 163 (1973). *See also Grays Harbor Logging Co. v. Coats-Fordney Co.*, 243 U.S. 251, 256 (1917); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981).

The petitioners observe that the respondent Commission has not yet determined how the subject property will be used. This will be decided only after the property is acquired and only after the use value hearing pursuant to Section 6 of the Medical Center Act. The petitioners argue that it is unconstitutional for the respondent to exercise its power of eminent domain without first having determined the specific use for the property to be acquired.

But, it is not improper for a redevelopment agency to acquire property for which an ultimate use has not yet been determined. Therefore, it is constitutional for the respondent Commission to acquire property from private owners in order to carry out the mandate of the General Assembly to prevent further deterioration and blight in the district and to "maintain the proper surroundings for

a medical center and to stabilize and retain therein large private investments in hospital, clinical and research facilities, . . . by providing for the expansion of medical and allied activity in the area surrounding the existing center of medical institutions. . . ." Preamble to the Medical Center Act, Appendix A1. It is now firmly established that a specific plan of development is not a prerequisite to acquisition where a public body is authorized to acquire property for redevelopment and to stop or prevent blight. *Berman v. Parker*, 348 U.S. 26 (1954); *Cf. Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

The resolution authorizing the acquisition of the subject property stated that the acquisition was for the purposes provided in the Medical Center Act. In conformity with the Medical Center Act, the public purpose of the present acquisition is to convert its use to a medical or allied activity. The General Assembly, in enacting the Medical Center Act, made clear that the entire district was to be used for medical center activities. The General Assembly found, in the preamble to the Medical Center Act, that the district was in an area of blight. The respondent Commission was created in order to maintain the proper surroundings for a medical center and to stabilize and retain therein "the socially valuable hospital, research facilities and care centers." The General Assembly's findings identified the means for encouraging the preservation and the expansion of the Medical Center District: "[T]his need can be met by providing for the expansion of medical and allied activity in the area surrounding the existing center of medical institutions, [and] if the character of such area is protected from further deterioration . . . ."

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EARL L. NEAL
111 West Washington Street
Suite 1010
Chicago, Illinois 60602
(312) 641-7144

Counsel of Record
for Respondent

MICHAEL D. LEROY
RICHARD F. FRIEDMAN
EARL L. NEAL & ASSOCIATES
Of Counsel

February 18, 1987

APPENDIX

Excerpts From Original Statute Creating Respondent Commission
1941 Ill. Laws vol. 1, p. 303 (1941)

AN ACT *in relation to the establishment of a medical center district in the city of Chicago and for the control and management thereof.*

WHEREAS, there exists in the Near West Side of Chicago a center of medical activity which has grown up over a long period of time without any definite plan; and due to the general deterioration of the surrounding district, this center is now in an area of so called blight; and in order to maintain the proper surroundings for a medical center and to stabilize and retain therein large private investments in hospitals, clinical and research facilities, it will be necessary to improve the condition of the surrounding territory; and there is need for additional services for the ill and infirm of Chicago and the surrounding communities; and this need can be met by providing for the expansion of medical and allied activity in the area surrounding the existing center of medical institutions, if the character of such area is protected from further deterioration, therefore

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

SECTION 1. There is created in the city of Chicago a medical center district hereinafter called, the District, whose boundaries are Ashland Boulevard on the east, Congress Street on the north, Oakley Boulevard on the west, and Roosevelt Road on the south.

§ 2. A medical center commission, hereinafter called the Commission, is created. Such Commission shall consist of five members, one of whom shall be appointed by the Governor, one by the Mayor of Chicago, one by the President of the County Board of Cook County, one by the

President of the Chicago Park District, and one by the Trustees of the University of Illinois. The first member appointed by the Mayor of Chicago shall hold office for one year, the first member appointed by the President of the Chicago Park District shall hold office for two years, the first member appointed by the President of the County Board of Cook County shall hold office for three years, the first member appointed by the Trustees of the University of Illinois shall hold office for four years, and the first member appointed by the Governor shall hold office for five years; members thereafter appointed shall hold office for a term of five years and until their successors are appointed as provided in this Act. The Commission shall meet within ten days after the appointment of the last member, and shall elect one of its number as president. Thereafter the Commission shall hold regular meetings annually for the election of a President, and for the adoption of a budget. Special meetings may be called by the President or by any two members. Each member shall take an oath of office for the faithful performance of his duties.

§ 3. The Commission is authorized to acquire real property lying within the District and personal property required for its purposes, by gift, purchase, lease or otherwise. All private real property within the District, except that owned by medical institutions or allied educational institutions, hospitals, dispensaries, clinics, churches, dormitories, or homes for the nurses, doctors, students, instructors, or other officers or employees of institutions located in the District, or any real property which is used for offices or for recreational purposes in connection with the aforesaid institutions may be acquired under the provisions of "An Act to provide for the exercise of the right of Eminent Domain", approved April 10, 1872, as amended.

§ 4. The Commission may construct in such District, hospitals, sanitariums, clinics, laboratories, or any other institution, building or structure which may be of use or benefit in the practice of medical science and treatment of human ailments, or office buildings for physicians or

dealers in medical accessories, or dormitories, homes, or residences for the medical profession, including internes, nurses, students, or other officers or employees of the institutions within the District, or for the use of relatives of patients in the hospitals or other institutions within the District.

* * *

Excerpts From Statute In Effect At The Time Of Respondent Commission's Resolution Authorizing Acquisition (Ill. Rev. Stat. 1979, Ch. 111½)

5001. District—Creation—Boundaries

§ 1. There is created in the City of Chicago a medical center district hereinafter called the District, whose boundaries are Ashland Boulevard on the East, a line co-incidental with Congress Street extending from Ashland Boulevard in a westerly direction to Oakley Boulevard on the north, Oakley Boulevard on the west and 13th Street on the south.

5002. Medical Center Commission—Creation—Powers—Offices—Membership—Vacancies—Personnel—Meetings—Reports

§ 2. There is hereby created a body politic and corporate under the corporate name of Medical Center Commission, hereinafter called the Commission, and by that name it shall have perpetual succession, power to contract and be contracted with, to sue and be sued except in actions sounding in tort, to plead and be impleaded, to have and use a common seal, and to alter the same at pleasure. All actions sounding in tort against the Commission shall be prosecuted in the Court of Claims. The principal office of the Commission shall be in the city of Chicago, and the Commission may establish such other offices within the state of Illinois at such places as to the Commission shall seem advisable. Such Commission shall consist of seven members, four of whom shall be appointed by

the Governor, one by the Mayor of Chicago, one by the President of the County Board of Cook County and one by the President of the Chicago Park District. All members shall hold office for a term of five years and until their successors are appointed as provided in this Act; provided, that as soon as possible after the effective date of this amendatory Act, the Governor shall appoint four members for terms expiring, respectively, on June 30, 1952, 1953, 1954 and 1955. The terms of all members heretofore appointed by the Governor shall expire upon the commencement of the terms of the members appointed pursuant to this amendatory Act. Any vacancy in the membership of the Commission occurring by reason of the death, resignation, disqualification, removal or inability or refusal to act of any of the members of the Commission shall be filled by the person who had appointed the particular member, and for the unexpired term of office of that particular member. Vacancies caused by termination of the period for which members were appointed shall be filled by new appointments for terms of five years each and until their successors are appointed as provided in this act. The Commission shall obtain, pursuant to the provisions of the "Personnel Code" enacted by the 69th General Assembly, such personnel as to the Commission shall seem advisable to carry out the purposes of this Act and the work of the Commission.

The Commission shall hold regular meetings annually for the election of a president, vice-president, secretary, and treasurer and for the adoption of a budget. Special meetings may be called by the President or by any two members. Each member shall take an oath of office for the faithful performance of his duties. Four members of the Commission shall constitute a quorum for the transaction of business.

The Commission shall submit, to the General Assembly not later than March 1 of each odd-numbered year, a detailed report covering its operations for the two preceding calendar years and a statement of its program for the next two years.

* * *

5004. Real and personal property—Acquisition

§ 3. The Commission is authorized to acquire the fee simple title to real property lying within the District and personal property required for its purposes, by gift, purchase, or otherwise, and title thereto shall be taken in the corporate name of the Commission. The Commission may acquire by lease such real and personal property found by the Commission to be necessary for its purposes and to such the Commission finds that it need not acquire the fee simple title for carrying out of such purposes. All real property within the District, except that owned and used for purposes authorized under this Act by medical institutions or allied educational institutions, hospitals, dispensaries, clinics, dormitories or homes for the nurses, doctors, students, instructors or other officers or employees of the aforesaid institutions located in the District, or any real property which is used for offices or for recreational purposes in connection with the aforesaid institutions may be acquired by the Commission in its corporate name under the provisions of "An Act to provide for the exercise of the right of Eminent Domain", approved April 10, 1872, as amended; provided, further, that no real or personal property owned by any religious organization, and used by it for religious purposes shall be acquired by the Commission under the provisions of "An Act to provide for the exercise of the right of Eminent Domain", approved April 10, 1872, as amended, by any parcel of real property used for both religious and secular purposes may be acquired by the Commission under said "An Act to provide for the exercise of the right of Eminent Domain."

5005. Institutions and buildings—Authority to construct

§ 4. The Commission may, in its corporate capacity, construct in such District, hospitals, sanitariums, clinics, laboratories, or any other institution, building or structure which may be of use or benefit in the practice of medical science and treatment of human ailments, or for such old peoples' homes as the Commission shall find useful in the study of, research in, or treatment of illnesses or infirm-

ities peculiar to aged people, after a public hearing to be held by any Commissioner or other person authorized by the Commission to conduct the same, which Commissioner or other person shall have the power to administer oaths and affirmations and take the testimony of witnesses and receive such documentary evidence as shall be pertinent, the record of which hearing he shall certify to the Commission, which record shall become part of the records of the Commission, notice of the time, place, and purpose of such hearings to be given by a single publication notice in a secular newspaper of general circulation in the city of Chicago at least ten days prior to the date of such hearing, or for such institutions as shall engage in the training, education, or rehabilitation of persons who by reason of illness or physical infirmity are wholly or partially deprived of their powers of vision or hearing or of the use of such other part or parts of their bodies as prevent them from pursuing normal activities of life, or office buildings for physicians or dealers in medical accessories, or dormitories, homes or residences for the medical profession, including internes, nurses, students or other officers or employees of the institutions within the District, or for the use of relatives of patients in the hospitals or other institutions within the District. All such structures and improvements shall be erected and constructed in accordance with Sections 28 and 49 of the Civil Administrative Code of Illinois, to the same extent as if the Commission were a Code Department.

* * *

5009. Sale or lease of real property

§ 6. The Commission may at such times as it deems advisable for the development of the District, lease any parcel of real estate acquired by it or sell the fee simple title thereto or any lesser estate therein to any medical or allied educational institution, hospital, dispensary, clinic, religious organization, corporation, trust, individual, or group of individuals, to be used, subject to the restrictions of this Act, for the purposes stated in Section 4, and to any corporation or person who shall use the same

for serving persons using the facilities offered within the District, subject to such restrictions as to the use thereof as the Commission shall determine will carry out the purpose of this Act. To assure that the use of the real property so sold or leased is in accordance with the provisions of this Act, the Commission shall inquire into and satisfy itself concerning the financial ability of the purchaser to complete the project for which said real estate is sold or leased in accordance with a plan to be presented by the purchaser or lessee, which plan shall be submitted, in writing, to the Commission. Such purchaser or lessee shall under such plan undertake (1) to use the land for the purposes designated in the plan so presented; (2) to commence and complete the construction of the buildings or other structures to be included in the project within such periods of time as the Commission fixes as reasonable; and (3) to comply with such other conditions as the Commission shall determine are necessary to carry out the project. Any real property sold by the Commission pursuant to the provisions of this Act shall be sold at its use value, which may be more or less than its acquisition cost, and which use value represents the value at which the Commission determines, after a hearing by the Commission or by such person as the Commission designates to hold such hearing, such real property should be made available for sale or rental in order that it may be developed for the accomplishment of the purposes of this Act. In determining the use value of the real property, the Commission shall take into consideration whether or not said property is to be used by a wholly or partially tax supported body created under the laws of the State of Illinois, by any department of the State government or any political subdivision of the State, by a charitable institution, or by a private person or institution operating for profit; and the Commission shall also consider the contribution that the project will make toward the development of the District and the furtherance of the purposes of this Act in determining such use price, provided, however, that the Commission may convey the fee simple title to land acquired by it, without the payment of any consid-

eration, to the State of Illinois, any political subdivision thereof or to any body politic and corporate or public corporation created under the laws of the State of Illinois for the carrying out of any function of the State. At any hearing for the purpose of the Commission's making the aforesaid determinations, an investigation should be made and such witnesses and documentary evidence examined as will have bearing on the use value of the property to be sold or leased as is herein provided. The Commission shall designate a Commissioner or other person of legal age to conduct the hearing provided for herein, and such Commissioner or other person so designated by the Commission shall give reasonable notice to the interested parties of the time, place and purpose for the holding of such hearing. Such Commissioner or other person designated by the Commission to hold such hearing shall have the power to administer oaths and affirmations, and shall cause to be taken the testimony of witnesses and the production of papers, books, records, accounts and documents; and the person so designated to hold said hearing shall certify to the Commission the record of the proceedings held before him in connection with such hearing. Such record of proceedings shall become a part of the records of the Commission. All such conveyances and leases of real estate made by the Commission to any medical or allied educational institution, hospital, dispensary, clinic, religious organization, or otherwise as authorized in this section shall be on condition that, in the event of non-use for the purposes prescribed in this Act, or of disuse for a period of one year, title to such property shall revert to the Commission, unless an extension is granted by the Commission after public hearings. All conveyances and leases made by the Commission to any corporation or person for use of serving the residents or any person using the facilities offered within the District shall be on condition that in the event of violation of any of the restrictions as to the use thereof as the Commission shall have determined will carry out the purposes of this Act, that title to such property shall revert to the Commission upon a finding by the Commission, after public hearing, of violation of

such restrictions, unless the Commission finds that financing necessary for the construction of any building or improvement to be used by any corporation or person for use of serving the residents or any person using the facilities offered within the District cannot be obtained if title to the land upon which such building or improvement is to be made is subject to such reverter provision, which finding shall be made by the Commission after public hearing held pursuant to a single publication notice given in a secular newspaper of general circulation in the City of Chicago at least ten days prior to the date of such hearing, such notice to specify the time, place and purpose of such hearing, and upon such finding being made, the Commission may cause such real property to be conveyed free of such reverter provision, provided that at least five members of the Commission vote in favor thereof. The hearing in this section provided for shall be conducted by any Commissioner or any other person authorized by the Commissioner, and the person conducting such hearing shall have the power to administer oaths and affirmations, and shall hear such oral evidence and receive such documentary evidence as shall be pertinent, and he shall certify the record of the hearing to the Commission. Provided, that in the event a reverter of title to any Property is declared by the Commission pursuant to the terms of this Act, the interest of the Commission shall be subject to any then existing valid mortgage or trust deed in the nature of a mortgage, but in case the title is acquired through foreclosure of such mortgage or trust deed or by deed in lieu of foreclosure of such mortgage or trust deed, then the title to or ownership of the property shall be subject to the reverter provisions contained in the Act as to any violations occurring thereafter as herein provided: Provided, further, that the Commission shall not least any individual room, apartment or housing accommodation; nor shall any property acquired for demolition in furtherance of the general plan for the development of the District be leased for a longer period than one year at a time.

No conveyance of real property shall be executed by the Commission without the prior written approval of the Governor.

Excerpt From Petitioners' State Brief
(Brief For Defendants-Appellants, Illinois Appellate Court, First District, No. 84-2435, pp. 37-39)

B.

THE CONDEMNATION PROCEEDINGS ARE FATALLY INFECTED WITH ADMINISTRATIVE BIAS AND CONFLICT OF INTEREST.

It will be recalled that the key resolution supporting the taking, dated July 17, 1981, was passed by a vote of four commissioners (a bare quorum) three of whom had ties to Rush, the instigator of the action which would not be deterred in its quest to take over the Church's lands. The resolution's movant, Roach, was at the time, an attorney for Rush.

Illinois Courts including this Honorable Court have long condemned the undermining effect which conflict of interest and bias bring to bear upon the administrative process. In *Commissioners of Union Drainage District No. 1 v. Smith*, 233 Ill. 417 (1908), the Supreme Court overturned the action of a commission organized to plan the enlargement of a drainage district and to make assessments of the adjoining properties where one of the commissioners owned lands among those subject to the assessment. The Court even invalidated as unconstitutional the statute which had enabled the appointment of such an incompetent commissioner. The Court stated:

> "Every constitutional provision that has ever been in effect in this state dealing with the method by

> which the property of an individual may be forcibly taken away from him, of necessity contemplated the determination of the question of the right to take that property by an impartial judicial body." 233 Ill. at 425-426.

Similarly, in *City of Naperville v. Wehrle*, 340 Ill. 579 (1930), the Supreme Court overturned a condemnation action where it appeared that one of the commissioners named to investigate and report to the court on just compensation was Secretary of the Naperville Board of Education. The overall condemnation plan included school land under the jurisdiction of the latter board. In the opinion adopted *per curiam* by the Court, it is stated:

> ". . . It is the general rule, even apart from statute, that officers acting in a judicial or quasi-judicial capacity are disqualified by their interests in the controversy to be decided." 340 Ill. at 581.

The opinion went on to liken the role of an administrative commissioner to that of a juror and noted:

> "One is not a competent juror in a case if he is master, servant, steward, *counsellor or attorney* of either party." 340 Ill. at 582. (Emphasis added).

To the same effect, see *In re Heirich*, 10 Ill.2d 344 (1957) where one of the commissioners in a professional discipline case was a partner in a law firm which represented an arguably interested third party.

Finally, this Honorable Court has recently added its own decision to the body of cases insisting upon exclusion of possibly biased decision-makers from the administrative process. In *Board of Education of Niles Township v. Reg. Board of Schools*, 468 N.E.2d 1247 (Ill.App., 1st Dist. 1984) this Court held invalid a school district boundary decision by a board of education because one commissioner who voted for the action had been a petitioner in a sepa-

rate proceeding conceivably adverse to the interests of a party then before the board.

The teaching of all these cases is clear in the controversy at hand. The condemnation proceedings of the Medical Center Commission are a nullity and must be set aside.

Supreme Court, U.S.
FILED
FEB 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED CHURCH OF THE MEDICAL CENTER, an Illinois religious corporation, **THE UNITED METHODIST BISHOP OF THE CHICAGO AREA**, et al.,

Petitioners,

v.

STATE OF ILLINOIS MEDICAL CENTER COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

SAMUEL W. WITWER, JR.*
SAMUEL W. WITWER, SR.
WITWER, MORAN, BURLAGE & WITWER
125 South Wacker Drive, Suite 2700
Chicago, Illinois 60606
(312) 332-6000
Attorneys for Petitioners

WALTER P. MAKSYM
Of Counsel

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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I. INTRODUCTION

Exposing the basic weakness of its case on the merits, Respondent Medical Center Commission devotes most of its opposition brief to a faulty procedural attack aimed at avoiding review by this Court. Respondent contends that: (a) Petitioners waived their Federal Due Process objection in that "the Illinois Appellate Court did not consider any Constitutional questions because the Petitioners raised none below". (Brief in Opp. at 6); and (b) the Appellate Court's remand to the trial court for prove-up of

severance damages to the Church's remainder property renders the issue of just compensation unreviewable under the finality requirements of 28 U.S.C., Section 1257(3). (Brief in Opp. at 8-10) Finally, Respondent suggests that under its governing statute it is unable to determine what is to be done with the Church's parking lot until after completion of the condemnation when a "use value" hearing can be held. (Brief in Opp. at 4)

As will now be shown, Respondent's factual assertions are demonstrably untrue; its legal position concerning finality is erroneous and contrary to the teachings of this Court in closely analogous cases. The case is ripe and must be heard in its entirety.

II. ARGUMENT

1. Petitioners' Claim That The Commission's "Conflict Of Interest" Violated Federal Procedural Due Process Was Timely, Explicitly And Continuously Made At All Stages Of The State Court Proceedings.

The fact that the Illinois Courts skirted the serious due process problem of this case resulting from the official role of Rush's own attorney and two other affiliated Commissioners, surely does not mean that Petitioners were remiss in their duty to raise the issue. The Appendix attached, containing excerpts from the Church's pleadings and briefs wholly refutes Respondent's contentions. It clearly shows that the Church claimed deprivation of its federal right to procedural due process at the earliest possible moment during the trial court proceedings after it learned, through discovery, of the conflict of interest. (Excerpts from Second Amended Traverse and Motion in support of filing same in Appendix below at A-1; Third Amended Traverse

at Paragraph 3, Appendix below at A-3 - A-4; Reply filed with trial court on February 1, 1982 at Page 17 *et seq.*, Appendix below at A-3) Thereafter, it repeatedly renewed the issue.

Respondent's contention that ". . . the Petitioners failed to raise any federal or constitutional grounds in the review before the highest court of the State . . ." (Brief in Opp. at 7) once again misinforms this Court. Petitioner repeatedly pressed the federal due process issue in its state appeals including *two* attempts to raise the point in the Illinois Supreme Court. In the Church's Petition for Leave to Appeal to the Illinois Supreme Court, it pointed out that the conflict of interest which had "fatally infected" the Commission's condemnation procedure offended "due process" and it cited federal and state cases dealing with federal due process requirements. (Appendix below at A-6)

When the Illinois Supreme Court summarily denied review, Petitioners tried yet another time to call to that Court's attention the federal due process implications of the egregious conflict of interest here at issue:

> This direct conflict of interest [Rush's attorney's role] not only resulted in a *gross deprivation of property without due process of law under federal and state constitutional standards*; it also resulted in a violation of Illinois statutory law which this court surely must have overlooked (emphasis added). (Appendix below at A-6).

Respondent Commission is wrong once again when it claims that the Church failed to assert the issue before the Illinois Appellate Court. First, the record which the Church caused to be filed before the Appellate Court contained numerous important filings before the condemnation trial court which repeatedly complained that federal due process rights had been violated. (Second Traverse

and Motion attached; Third Amended Traverse and Reply of February 1, 1982, Appendix below at A-3 and A-4) These were not merely minor documents hidden within the record; rather, they constituted the Church's fundamental pleadings central to the case. Moreover, the Church affirmatively sought in its brief to draw those basic pleadings to the Appellate Court's attention. In a portion of the Church's Appellate Brief conveniently *omitted* from the Respondent's Appendix purporting to contain the "entire text" of the Church's presentation to the Appellate Court, the Church said:

> "*The Ties Between Certain Commissioners and Rush* . . . the record shows that three (3) of the Commissioners who authorized the condemnation, Messrs. Livingston, Hoffman and Roach, have important links to Rush, *matters duly raised by the Church in its traverses.*" (emphasis added). (Appendix below at A-5).

Immediately thereafter, the Church invited the Appellate Court to:

> . . . *see* Second Amended Traverse at Page 3, Paragraph A (C-71); Reply Memorandum . . . at Page 4, *et seq.*, (C-134); and Third Amended Traverse at Pages 2-3 (C-197)." (emphasis added). *Id.* at A-5.

All of these basic pleadings filed with the Appellate Court and cited in the Church's Brief to that court are laced with federal due process arguments and citations as shown earlier.

Petitioners' appellate court argument heading ("The Condemnation Proceedings are Fatally Infected with Administrative Bias and Conflict of Interest") concededly failed to repeat the talismanic words "due process" but its thrust could scarcely be mistaken given the strong due process foundation that had been laid in the record and pleadings placed before the Appellate Court. Further, the

state court decisions cited by the Church immediately under that argument heading were in essence due process cases. Included among the authorities cited and quoted by the Church in its brief was *City of Naperville v. Wehrle*, 340 Ill. 579 (1930) which, in turn, adverted to *Tumey v. Ohio*, 273 U.S. 510 (1926), a leading due process case of this Honorable Court. (340 Ill. at 581; Petitioner's Brief to Illinois Appellate Court at 38, Appendix below at A-5)

Clearly, there has been no waiver. The attached Appendix of the Church's incessant efforts to uphold its federal due process rights in state court speaks for itself and is dispositive.[1] The Church should not be held to have waived its rights simply because the Illinois judiciary chose to give a shallow, non-constitutional treatment to the serious federal issues which it raised.

2. All Issues In This Appeal, Including The Church's Constitutional Right To "Just Compensation" By Way Of Provable Severance Damages Are Effectively Final And Ripe For Review On Certiorari.

Respondent maintains (Brief in Opp. at 8) that the "just compensation" issue of this appeal is lacking in finality and unreviewable because the Appellate Court remanded that portion of the case to the trial court to hear proof of severance damages, if any, to the Church's remainder. This overlooks the fact that the remand in question has been rendered a meaningless exercise and formality for

[1] Contrary to Respondents claim, (Brief in Opp. at 7) Petitioners did not fail to observe Rule 21.1(h) which requires specification of their efforts to raise federal issues below. Such specification, including many of the Church's pleadings excerpted in the attached Appendix, was duly set forth in the Church's Petition for Certiorari at page 14. Likewise, a second specification dealing with the just compensation issue of federal constitutional law appeared at page 16.

the Church because its request for disclosure of the Commission's plans (an essential prerequisite to proving severance damages to the Church's sanctuary) has been *rejected* at all levels of the state judicial system.

Knowledge of the condemning authority's purpose may not be vital information for an owner whose whole property is being taken since he can ascertain and recover the fair market value of the total parcel *regardless* of its future anticipated use.[2] However, where, as here, a portion of the owner's property is taken away and the owner continues in possession of the adjoining property, knowledge of future use becomes crucial. Without it, the owner cannot deduce what injury will be inflicted upon his remainder and is incapable of proving up severance damages which are an integral part of his federal constitutional right to just compensation. Like the federal due process issue, this issue was duly and repeatedly raised in the courts below. (First Amended Traverse; Appendix E to Petition for Certiorari; Brief to Appellate Court at 33-36; Reply Brief to Appellate Court at 8; Petition to Illinois Supreme Court for Leave to Appeal at 25-28, 34-35).

Herein lies the "just compensation" dilemma in the present case and the reason for its practical finality. The Illinois court has ordered the remand, but in the same opinion has refused to require any disclosure of intended use, thus depriving the Church of its ability to recover *any* compensation during that remand hearing. Thus, since the outcome of the remand is pre-ordained under the Appellate Court's guidelines, the decision is effectively a final

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[2] This Court's decisions in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), cited by Respondent as authority for "planless" condemnations (Brief in Opp. at 10) are inapposite. Neither case involves the right to severance damages in a partial condemnation, the situation confronted in the case at bar.

one, satisfying the prerequisite for this Court's jurisdiction under 28 U.S.C., Section 1257.

It has long been held by this Court that the requirement of finality is to be given a "practical rather than a technical construction". *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528 (1948); *Brown Shoe Co. v. United States*, 370 U.S. 294, 306, 8 L. Ed. 2d 510 (1962). Here, as a *practical* matter, the Church's six-year quest to find out what will be done with its parking lot is over, having been resolved adversely by the Illinois Courts. The issue is foreclosed and the legal ground rules for the remand have been set on terms intolerable to the Church. All efforts to prove-up severance damages under these conditions will be futile as will be any post-remand effort to gain relief from the same state court system which has already denied it. It simply makes no sense to ask the Church to return later to the same reviewing courts where it has been repeatedly rebuffed on the same question of "disclosure of purpose."[3]

Because remand on the terms set by the Illinois Courts would put the Church in a hopeless position relative to proof of severance damages, the instant case therefore squarely fits within the category of cases where immediate review ". . . is fundamental to the further conduct of the case". *United States v. General Motors Corp.*, 323 U.S. 373, 377, 89 L. Ed. 311 (1944). Although it did not deal with severance damages, *General Motors*, a condemnation case, is in other respects strikingly similar to the instant case. There, as here, the occupant of property sought review of an adverse determination concerning the

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[3] In fact, separation of the "just compensation" issue from the due process issue in the instant appeal would actually *promote* piecemeal review in violation of one of the chief aims of the finality rule (*cf. North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 38 L. Ed. 2d 379, 383 (1973).

scope of its right to just compensation. There, as here, the appellate court remanded the case for a trial on compensation damages in accordance with its ruling. In granting review, this Court recognized that a proper framework of controlling constitutional principles defining just compensation should be laid down before, not after the compensation trial:

> "We think that we should review that ruling [on scope of just compensation] *inasmuch as it is fundamental to the further conduct of the case.* The correctness of the decision of the court below depends upon the scope and meaning of the constitutional provision: 'nor shall private property be taken for public use, without just compensation . . .' " (emphasis added) 323 at U.S. 377.

Other decisions involving remands or continuing state court proceedings of one kind or another also support the Church's position that the case is final. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328, 340 (1975), this Court described as reviewable:

> ". . . those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the *outcome of further proceedings pre-ordained.* In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." (emphasis added) 420 U.S. at 479.

To the same effect, see *Mills v. Alabama*, 384 U.S. 214, 16 L. Ed. 2d 484 (1966) (remand of state criminal case no bar to review where Appellant would have no remand defense other than his federal claim and could not prevail at trial on existing facts or any non-federal ground); *Construction Laborers v. Curry*, 377 U.S. 542, 550, 9 L. Ed. 2d 514 (1963) (appellant had no recourse on remand other than the federal claim already ruled upon adverse-

ly in state court case; matter for all practical purposes thus concluded). There is nothing further to be litigated in state court on the basic federal question of just compensation. Review of this pressing question must not be postponed.

3. The Respondent Commission's "Use Value" Hearing Procedure Under The State Medical Center Act Does Not Require That The Commission Condemn Now And Decide Later How A Parcel Is To Be Used.

In an apparent effort to explain why it has withheld from Petitioner Church any plans or information as to the real purpose of the taking for over six years, the Commission points to Section 6 (Illinois Revised Statutes, Chapter 111½, Section 5009) of its enabling statute (Brief in Opp. at A-6) and implies that it is somehow bound to await completion of the condemnation procedure before it holds a "use value hearing" to formalize its intentions. This is not so. There is not a word in the statute which requires that such an action be deferred. Indeed, past practice involving numerous prior condemnations within the medical center district demonstrates that designation of use and users can and has been made before and during, as well as after completion of condemnation proceedings in court. (Defendant's Exhibit No. 5)

When the fundamental right to prove severance damages as a part of just compensation is at stake, in a partial taking, the use value hearing *must*, indeed be completed before the court case is over. The refusal of disclosure which occurred here is unexplained and inexcusable.

Finally, the Appellate Court's and Respondent's suggestion that the "conflict of interest" here at issue can be cured during a future "use value" hearing by a mere objection by the Church to a formal transfer of the property to Rush (slip opinion in Appendix to Petition for Cer-

tiorari at A-7) is untenable. Such a theoretical right of the Church, *in the future*, to contend that some user *other* than Rush should be awarded the property because of the collusion here at issue would be cold comfort, to say the least, *after* the Church has already irrevocably lost its property.

Plainly, the Commission has capriciously delayed its disclosure of a purpose for the instant taking, either to confound the Church and frustrate its efforts to secure just compensation or, to conceal the Commission's *sub rosa* arrangements with Rush.

CONCLUSION

For all of the reasons stated above, the Petition for Writ of Certiorari should be granted. The two important federal constitutional issues raised therein were explicitly raised in the state courts, are ripe for determination and should be taken together, not bifurcated under a strained application of the finality doctrine.

Respectfully submitted,

SAMUEL W. WITWER, JR. *
SAMUEL W. WITWER, SR.
WITWER, MORAN, BURLAGE & WITWER
125 South Wacker Drive, Suite 2700
Chicago, Illinois 60606
(312) 332-6000
Attorneys for Petitioners

WALTER P. MAKSYM
Of Counsel

* Counsel of Record

APPENDIX

Excerpts From Pleadings And Briefs By Petitioners, United Methodist Bishop, et al., In The state trial, Appellate And Supreme Courts Pertaining To Issue Of Disqualifying Conflict Of Interest From The Standpoint Of Due Process Of Law:

". . . such . . . process is totally tainted by improper dealings and collusion between the Petitioner Commission and Rush Presbyterian St. Lukes Hospital, the putative taker of defendants' properties. The dual attack on defendants' property rights which is flawed by the Hospital's unlawful domination of Petitioner, a public agency, and which would *flagrantly deny defendants their rights to due process of law,* is more specifically described as follows:

A. The resolutions enabling and authorizing the Commission to condemn this property were procured by Rush Presbyterian St. Lukes Hospital through its collusion with, and domination of, the Commission rather than by a fair, independent, deliberative process as required by *due process of law as provided in the Fourteenth Amendment to the United States Constitution.*"

Second Amended Traverse of Petitioner Church at par. 3, filed with trial court April 15, 1981 and filed as part of record with Illinois Appellate Court (Item C-71) on January 11, 1985. (emphasis added).

* * *

"3. The instant Traverse and Motion (Second Amended) is made necessary by information learned through discovery in this matter and a companion matter now pending in the Federal Court (*United Church of the Medical Center v. Medical Center Commission and Raymond J. Bayster*, Northern District of Illinois, Eastern Division, Case No. 80 C 4617) which raises *serious constitutional issues not before presented* as are more fully set forth in the Second Amended Traverse and Motion to Dismiss."

Motion for Leave to File Second Amended Traverse at par. 3, filed with trial court on April 15, 1981 and filed as part of record with Illinois Appellate Court as (Item C-68) on January 11, 1985. (emphasis added).

* * *

"A. THE ENABLING RESOLUTIONS FOR CONDEMNATION ARE INFECTED BY CONFLICT OF INTEREST, AND THEY ARE VOIDABLE *AS A MATTER OF DUE PROCESS.*

The record shows that three of the sitting Commissioners, Roach, Livingston and Hoffman, have important links to the Hospital. Commissioners Livingston and Hoffman are top officers of the Chicago Foundlings Home, which is an affiliate operating out of the premises of the Hospital. Roach was, until sometime in 1979, an employee of the Hospital acting as its principal legal counsel. (Appendix D attached at Par. 2)

* * *

"Both Illinois and *Federal* cases have long condemned the undermining effect which conflict of interest and bias bring to bear upon the administrative process. [citations omitted].

* * *

Federal decisions likewise condemn conflicts of interest similar to those presented in the case at bar. See *Trans-World Airlines v. Civil Aeronautics Board*, 254 F.2d 90 (D.C. Cir. 1958) (former attorney for litigant later became Commission of Board hearing case involving litigant); also, *American Cyanamid Company v. F.T.C.*, 363 F.2d 757 (6th Cir., 1966) (former attorney for Senate Committee investigating drug companies later became chairman of F.T.C. and participated in decision against such companies)."

[Additional federal citations omitted] Excerpts from pp. 7-8 of Reply filed by Petitioner Church with trial court on October 12, 1981 and filed as part of record with Illinois Appellate Court (Item C-134) on January 11, 1985. (emphasis added).

* * *

"2. In addition to all other grounds previously alleged concerning the violation of Defendant's *due process* and First Amendment rights, the Commission was and is incompetent to authorize the instant condemnation by reason of the facts that (a) Commissioner Roach was Vice President for Legal Affairs and Assistant Secretary to Rush-Presbyterian St. Luke's Medical Center as disclosed in his ethics statement for 1980, copy attached hereto and incorporated herein as Exhibit B, and received income in

excess of $5,000 in legal representation of Rush-Presbyterian St. Luke's Medical Center as disclosed in ethics statement for the year 1981 . . ."

Third Amended Traverse of Petitioner Church at par. 2, filed with trial court on Feb. 1, 1982 and filed as part of record with Illinois Appellate Court (Item C-197) on January 11, 1985. (emphasis added).

* * *

"THE CONDEMNATION PROCEEDINGS ARE *FATALLY INFECTED* WITH ADMINISTRATIVE BIAS AND CONFLICT OF INTEREST."

Argument Heading "B" of Petitioner Church's Brief to Illinois Appellate Court filed January 11, 1985. (emphasis added).

* * *

"A statute which compels the litigant to submit his controversy to a tribunal of which his adversary is a member makes his antagonist his judge and *does not afford due process of law.*" (emphasis added).

Excerpt from *Commissioners of Drainage District v. Smith*, 233 Ill. 425-426 (1908) cited by Petitioner Church in Heading B of its Brief to Illinois Appellate Court filed January 11, 1985.

* * *

". . . it is the general rule, even apart from statute, that officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided. (*Tumey v. Ohio*, 273 U.S. 510 . . .)"

Excerpt from *City of Naperville v. Wehrle*, 340 Ill. 579 at 581 (1930) cited *and* quoted by Petitioner Church in Heading B of its Brief to Illinois Appellate Court filed January 11, 1985. [additional argument and citations omitted].

* * *

"E. The Ties Between Certain Commissioners And Rush.

The record shows that three of the sitting Commissioners who authorized the condemnation, Messrs. Livingston, Hoffman and Roach, have important links to Rush, matters duly raised by the church in its traverses. *(See Second Amended Traverse at p. 3, par. A (C-71); Reply Memorandum in Support of Second Amended Traverse at p. 4, et seq., (C-134); and Third Amended Traverse at pp. 2-3, (C-197).)"*

Petitioner Church's Brief to Illinois Appellate Court at p. 22 directing that Court's attention to the Church's principal trial court pleadings raising federal due process deprivations. (emphasis added).

* * *

"THE CONDEMNATION PROCEEDINGS ARE FATALLY INFECTED WITH ADMINISTRATIVE BIAS AND CONFLICT OF INTEREST AND SHOULD THEREFORE BE INVALIDATED.

It is elementary that the administrative process must provide both fairness and the appearance of fairness where, as here, a governmental agency or commission is empowered to make determinations which directly affect fundamental rights of individuals. *Due Process* demands a disinterested decisionmaker to assure fairness. See *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F.2d 260 (D.C. Cir. 1962)."

Excerpts from argument Heading B of Petitioner Church's Petition for Leave to Appeal to Illinois Supreme Court (p. 28) filed May 5, 1986. [additional argument and citations omitted].

* * *

"This direct conflict of interest [Rush's attorney's role] not only resulted in a *gross deprivation of property without due process of law under federal and state constitutional standards*; it also resulted in a violation of Illinois statutory law which this Court must surely have overlooked."

Petitioner Church's Motion to Illinois Supreme Court for Leave to File Motion to Reconsider Denial of Review filed November 15, 1986 at p. 6. (emphasis added).